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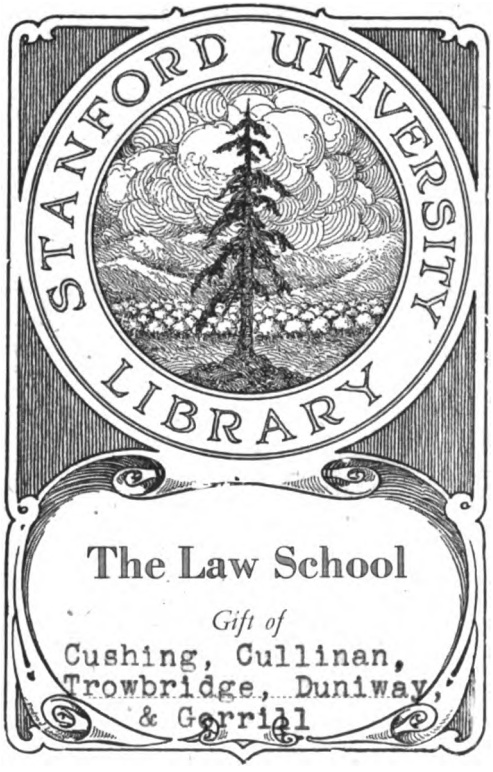


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# MONOPOLY

AND

# TRADE RESTRAINT CASES

INCLUDING

CONSPIRACY, INJUNCTION, QUO WARRANTO,
PLEADING AND PRACTICE AND EVIDENCE

BY

JOHN LEWSON
OF THE CHICAGO BAR

VOLUME I

T. H. FLOOD & COMPANY
CHICAGO, ILLINOIS
1908

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To the Memory of

**HON. JOSEPH MEAD BAILEY**

Chief Justice of the Supreme Court of Illinois,
in deep admiration of his pure character, juridical attainments,
and inspiring instruction, this work is
dedicated by his pupil.

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# PREFACE.

The investigator of the trust problem finds himself in a maze of Legislation, Case-Law and Trust literature. About thirty states have legislated directly on the subject of monopolies. There are nearly four hundred and fifty cases dealing directly or indirectly with monopolies and restraint of trade. Almost seven hundred authors have made important contributions on various phases of the trust problem. The legislative branch of this question is surrounded with difficulties, from the fact that in several parts of this country there exists a strong desire, on behalf of the people, to rid themselves of the trust evil at any cost; and there, legislation has taken a most radical and dangerous form, not only for the trusts, but also as establishing legislative power heretofore unheard of and which, if upheld by the courts, would invest American Legislatures with limitless powers. From the judiciary the trust problem has received, and is likely to receive, the most signal service, the judiciary acting as a balance of power and fully sustaining the wisdom of a co-ordinate and independent branch of government. The courts, however, are beset by numerous limitations. They cannot take the initiative on the trust, or any other question. They cannot legally decide any question of public policy when Legislatures have declared what that policy shall be. And courts are not at liberty to decide questions not

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raised by the records before them. But, as the root of the trust problem is of a sociological nature, courts are more or less influenced and bound by the fundamental principle that the public welfare must be preserved (*Salus populi est suprema lex*). Considering that in cases involving monopolies the most eminent counsel are employed on both sides; that voluminous records are made, and that briefs of portentous size challenge attention on every important point, the courts have done exceedingly well in disposing of the questions raised thus far. The object of general literature on the trust question is to afford the public the benefit of special investigation by earnest and public spirited persons. This literature is important in presenting the question before the people in all its economic phases and in creating a sound public opinion which influences the Legislatures and Judiciary.

It is with one of the foregoing sources of investigation—the Case-Law on the subject of monopolies—that this work is concerned. Not every one has the time nor inclination to read through a lengthy opinion of court. After reading the opinion, there comes a desire to preserve its substance for future reference. Again, when reading a brief, opinion or text-book, a certain case is cited in support of a principle. To ascertain the correctness of the reference, a reading of the entire case cited might become necessary. By having a short history of the case and brief statement of the points decided therein, one can readily verify the citation. It is with these objects in view that the present work was undertaken.

Throughout the entire study of these cases it has been the aim to discover the principle or rule, and the reason, upon which the particular case was decided. The decisions are full of loose language and reflect more or less the feeling and prejudice of the times on the subject. In almost every im-

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portant case dissenting opinions have been rendered. The subject is a delicate one and difficult to understand, unless one has devoted a sufficient amount of study to it. In formulating rules the endeavor has been to use the language of the court whenever possible, the constant desire being to give the subject complete justice.

The scope of this work is limited to cases arising out of commercial monopolies and restraint of trade. A State having unlimited power within its borders, it has the power to create monopolies or grant exclusive privileges in certain branches of business, unless constitutionally restrained. Exclusive privileges are usually conferred upon *quasi* public corporations. Monopolies originating from exclusive legislative grant rest upon entirely different principles from those which control industrial or commercial trusts or combinations. Cases involving this class of monopolies are very few and have been purposely omitted from this work. Such cases belong to a treatise on municipal corporations.

Another class of cases not included in this work is that involving labor unions. There are at least three reasons why anti-trust statutes and decisions should not be applied to unions. These reasons are:

(1) The prime motive for enacting legislation against monopolies is not to curb unions, but to remedy commercial conditions. Labor is not a commodity subject to barter and sale as something inanimate and powerless, and neither Legislature nor court can reduce labor or services to the dead level of a commodity. Again, monopoly in labor or services, without the consent of capital, or without force, is inconceivable. Whatever right or power resides in Legislature or Court to curb labor abuses, it cannot and should not be predicated upon any trust or monopoly provisions.

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(2) Statutes against monopolies are often highly penal and should be construed strictly and not loosely and liberally.

(3) The construction of a statute including within its terms labor unions is nothing less than judicial legislation and is a clear usurpation of legislative power.

The original foundation for this work was a specially prepared table of cases. As the work progressed, other cases were added. The table of cases in the forepart of this work has been carefully selected and contains a full list of all of the anti-trust cases, and a great many of the important cases upon restraint of trade. Full references are given in this list to reports and places where the particular case may be found. In citing cases in any part of the book, the table of cases should invariably be consulted.

Over and mis-citation of authorities are two of the evils from which the profession is suffering. A large portion of a lawyer's time is consumed in looking for apt cases, and while so doing many a case is read and brushed aside. Under Excluded Cases in this work is given a list of cases that have been read and found to have been mis-cited in some of the opinions. It was thought worth while to include these cases in this work with a statement of the reasons why they should be considered inapplicable to the subject of monopolies.

A very important part of every law book is an index. To a Case-Book, the index is doubly useful. Great care has been given to this part of the work. References and cross references are used liberally under every conceivable classification of the law. The plan of indexing is natural and alphabetical. The fact that every author has a different mode of indexing is one of the objections urged to a text-book index.

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Great care has been given to obviate this objection. References are to pages and paragraphs containing the particular point of decision. It is hoped that the manner of indexing this work can be readily learned and that the index will prove of special value. Under the present development of Monopolies as a specific branch of law, the subject matter of this work, together with the index, will prove of especial benefit.

JOHN LEWSON.

Chicago, May 11, 1908.

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# ANALYZED CASES.

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# MONOPOLY AND TRADE RESTRAINT CASES.

## ADDYSTON PIPE & STEEL CO. v. UNITED STATES.

(175 U. S. 211, 44 L. ed. 139, Tenn. 1899.)

**Constitutional law, interstate commerce; Private contracts, limitation; Restraint of interstate commerce; Definitions; Defenses; Jurisdiction.**

In a petition on behalf of the United States against the hereinafter named corporations, it was charged that in the latter part of December, 1894, six corporations, Addyston Pipe & Steel Co., of Cincinnati, Ohio, Dennis Long & Co., of Louisville, Kentucky, Howard-Harrison Iron Co., of Bessemer, Alabama, Anniston Pipe & Foundry Co., of Anniston, Alabama, South Pittsburg Pipe Works, of South Pittsburg, Tennessee, and Chattanooga Foundry & Pipe Works, of Chattanooga, Tennessee, entered into a combination and conspiracy to prevent competition between them in any of the thirty-six enumerated states and territories in regard to the manufacture and sale of cast iron pipe and to enhance its price; that to carry out such conspiracy the defendants had since that time operated their shops and had been selling and shipping their pipe into other states and territories; and that such sales and shipments were made according to certain bonuses. The prayer of the petition was for the confiscation and forfeiture of the pipe shipped under the said conspiracy, for the dissolution of the combination,

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and for an injunction. The portion of the bill praying for confiscation of property, etc., was demurred to, on the ground that confiscation and forfeiture of property could only be accomplished through a court of law. In separate answers, the defendants admitted the existence of an association for the purpose of avoiding great losses due to ruinous competition, denying that the association was in restraint of trade, state or interstate, or that it was organized to create a monopoly. The evidence, at the trial, disclosed that the various defendants entered into a two-years' written agreement, in which certain territory was designated as "pay" and "free" territory; that a list of bonuses was adopted, which bonuses were to be divided and pooled equally by each of the defendants, based on an agreed yearly tonnage capacity; that an auditor was appointed to keep account of each member's shipments and to make division of bonuses, etc.; that in May, 1895, this system was changed by fixing prices for each contract except in reserved cities, by competitive bidding of the members at a secret auction pool, the one agreeing to give the highest bonus for division among the others being permitted to become the lowest bidder at the public letting; that this plan was carried out through a representative board or committee of the members of the association located at a central point, to which board all inquiries for pipe were referred; that this board fixed the prices at which pipe was to be sold and bids were to be taken from the various members; that pursuant to this plan prices for pipe were fixed and maintained at certain amounts; that in order to give an appearance of active competition between the members, the members not entitled to the contract were notified in advance to put in a bid at such a figure as the selected bidder requested; that the capacity of the defendants' mills was based upon the adoption of arbitrary or restricted yearly aggregate output of 220,000 tons; that in the "pay" territory there were eight non-association mills, with an aggregate annual capacity of 170,500 tons;

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that there were twelve non-association mills in the "free" territory, with an aggregate annual capacity of 348,000 tons; that the object of the association, it was claimed, was not to raise prices beyond what was reasonable, but only to prevent ruinous competition between the defendants; and that the bonuses charged were not exorbitant profits and additions to a reasonable price, but they were deductions from a reasonable price in the nature of a penalty or burden intended to curb the natural disposition of each member to get all the business possible and more than his due proportion. The trial court dismissed the petition. On appeal to the circuit court of appeals, the judgment of the lower court was reversed, with instructions to enter a decree perpetually enjoining defendants from maintaining the combination in cast iron pipe and from doing any business under such combination. In modifying and affirming this judgment, the supreme court held that:

(1) Under the commerce clause of the Federal constitution, congress has power to prohibit the making or performing of private contracts having interstate or foreign commerce for their object and which result in a direct and substantial obstruction to or regulation of that commerce; (175 U. S. 228, 235)

(2) The Federal constitutional provision, that no person shall be deprived of life, liberty or property without due process of law, is limited by the commerce clause of the constitution, which gives power to congress to regulate commerce; (pp. 229, 235)

(3) Any substantial regulation of interstate or foreign commerce by any other power than that of congress, after congress has itself acted thereon, even though such regulation is effected by means of private contracts between individuals or corporations, is illegal; (p. 230, 231)

(4) "Any agreement or combination which directly operates not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce,

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by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent trenches upon the power of the national legislature and violates the statutes;" (p. 242)

(5) Interstate commerce is directly and immediately restrained where the *actual* intention of the parties to, and the object of, a combination, in respect of articles manufactured by any of such parties, is to transfer their articles beyond the state in which they were made for sale and delivery in another state upon the terms and pursuant to the provisions of the combination, although no particular contract regarding the furnishing of such articles was in the contemplation of the parties to the combination at the time of its formation; (pp. 240, 241)

(6) When the necessary, direct and immediate effect of a contract is to violate an act of congress and also to restrain and regulate interstate and foreign commerce, whether the design to so regulate was, or was not, in existence when the contract was entered into, is immaterial; (p. 234)

(7) "Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for the purpose, but also the purchase, sale and exchange of commodities;" (p. 241.)

(8) A sale of an article for delivery beyond a state makes the transaction a part of interstate commerce; (p. 242)

(9) "Where the contract is for the sale of the article and for its delivery in another state, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfill his contract of sale;" (p. 246)

(10) Whether or not a combination is in restraint of interstate trade is to be tested by its effect in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, taking into consideration all the facts and circumstances; (p. 245)

(11) "Where a direct and immediate effect of a contract

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or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made;" (p. 244)

(12) Any combination among dealers in a commodity, which, in its direct and immediate effect, forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another state, is in restraint of trade or commerce among the states, although the article to be transported and delivered in another state is still taxable at its place of manufacture; (p. 246)

(13) It is no defense to the charge of being a monopoly that prices are only partially affected and that there is only an incomplete monopoly, it being sufficient to annul a contract or combination if it really tends to being a monopoly and to deprive the public of advantages derived from free competition; (p. 237)

(14) Combinations or agreements, in so far as they relate to trade or commerce solely within a state, are not within the Sherman anti-trust law; (p. 247) and

(15) Where a combination or agreement relates to both state and interstate commerce, Federal courts, under the Sherman Act, have no jurisdiction over that part of the combination or agreement which concerns commerce wholly within the state. (p. 247)

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## AETNA INSURANCE COMPANY v. COMMONWEALTH.

(106 Ky. 864, 51 S. W. 624, 45 L. R. A. 355, 1899.)

**Combinations, Common Law; Statutes, Kentucky, Insurance; Foreign Corporations, Service.**

Appellant, a foreign corporation, was indicted for combining with eighty-six other insurance companies, agents and persons, as a voluntary association, "to establish and enforce uniform commissions, adequate rates, correct forms of policies, and to inculcate sound principles of underwriting." It was held that:

(1) Being a member of a combination for the purpose of maintaining fire insurance rates is not an indictable offense at common law; (45 L. R. A. 362)

(2) Sec. 3915, Ky. Stats., does not prohibit the creation of a combination or voluntary association of insurers having for its object the establishment of uniform terms upon which contracts of insurance shall be entered into; (p. 358) and

(3) The service of summons founded upon an indictment against a foreign insurance company is within the consent-statute authorizing service upon an agent or insurance commissioner. (p. 362)

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## ALEXANDER v. UNITED STATES.

(26 Sup. Ct. Rep. 356, 201 U. S. 117, 50 L. ed. 686, Wis. 1906.)

### Appeals; Interlocutory Order.

On witnesses refusing to testify and produce written evidence before a special examiner in a proceeding by the United States against the General Paper Company and others for an alleged violation of the Sherman anti-trust law, application was made to, and an order obtained from, a United States court, requiring such witnesses to appear, produce documents, and testify before said officer. From this order, the witnesses attempted to take an appeal to the United States supreme court. That court dismissed the appeal, holding that:

A court's order, requiring a witness to produce books or documents and testify in a case before a special examiner, when not followed by an order punishing the witness in case of disobedience, is interlocutory in the original suit, and, therefore, is not appealable.

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## ALLEN v. FLOOD.

(L. R., A. C. "1898" 1, 67 L. J. Q. B. 119, 17 Rul. Cas. 284, Eng. 1897.)

### Master and Servant; Wrongful Act, What Not; Damnum Absque Injuria.

Rival associations of working men, registered under the Trade Unions Act of 1871—the Independent Society of Boiler-Makers and Iron and Steel Ship Builders' and the Shipwrights' Provident Union—had this difference in their regulations: The former restricted the labor of its members to ironwork; while the latter permitted its members to work either in wood or iron. In April, 1894, there were in the employ of G about forty union boiler makers, who were engaged in repairing an iron ship. At that time there were also in the employ of G two union shipwrights who, with twenty other shipwrights, were engaged in executing repairs upon the woodwork of the vessel. On a former occasion and for another employer these two shipwrights performed ironwork. This fact coming to the knowledge of the boiler makers in the employ of G, they resolved to strike in a body at the end of the day, their employment being from day to day. Fearing, however, that they would not be allowed strike pay by their union without its approval, they, on April 12th, through one of their number, called in A, a member and delegate of their union. On the following day A appeared at the place of the trouble, was fully informed of the difficulty and told that the men desired to strike on that day after the noon hour. A objected to this for the reason that no attempt had been made to settle the matter otherwise. An interview with the officials representing G followed, resulting in the discharge of the two shipwrights, at the end of the same day. Thereupon the boiler makers continued their work.

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In July, 1894, an action for damages was begun against A, said delegate, J, the chairman, and K, the secretary of the Boiler Makers' Society. Upon the trial J and K disclaimed all connection with and responsibility for A's acts, and they were consequently acquitted. A was found guilty, and a verdict for forty pounds rendered against him. A judgment upon this verdict was thereupon entered and an appeal was taken to the court of appeal. That court affirmed the judgment. On further appeal to the House of Lords, the case was tried before nine lords and eight judges. At the close of the argument, the lords asked of the judges the following question: "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" Six judges answered in the affirmative; two in the negative. On final consideration by the House of Lords the judgment of the court of appeal was reversed and judgment entered for the defendant (appellant), six lords delivering opinions for reversal, and three lords delivering opinions for affirmance. The principal majority opinions are based, in part, on these grounds:

(1) That the mere act of inducing any one not to enter into contract relations with another is not actionable;

(2) A person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his motive may be, has no remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though the conduct of the person causing the injury is without justification or excuse and is actuated by malice towards the person injured; (67 L. J. Q. B. 198)

(3) That "any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed,

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whether the motive which prompted it be good, bad or indifferent; but the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due;" (17 Rul. Cas. 311)

(4) That "in any legal question, malice depends, not upon evil motive which influenced the mind of the actor, but upon the legal character of the act which he contemplated and committed;" (p. 312)

(5) That "coercion, whatever be its nature, must, in order to infer the legal liability of the person who employs it, be intrinsically and irrespective of its motive a wrongful act." (p. 316)

NOTE.

The principal minority opinion of the lords (Halsbury, L. C.) is based on the broad principles: (a) that a person has a right to pursue his trade or calling unmolested, and any undue interference with that right by any act is an actionable wrong, unless the same can be justified or excused (pp. 292, 343); (b) that the defendant under the circumstances of the case was guilty of coercion through intimidation (p. 300); and (c) that the lawfulness or unlawfulness of the particular act depended upon whether the motive was lawful or unlawful (p. 303, *et seq.*)

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## AMERICAN BISCUIT & MANUFACTURING CO. v. KLOTZ et al.

(44 Fed. 721, U. S. C. C., La. 1891.)

**Illegal Combination; Receivership; Title to Property; Practice.**

The American Biscuit & Manufacturing Company was organized through a subscription of a small number of shares, apparently enough to qualify directors, the great mass of stock being taken and held by irresponsible parties and used in parceling out as fully paid stock to such leading and successful bakeries throughout the country as were induced to come in on an agreed valuation of the property and a large estimate of the good will. Each bakery, when secured, was carried on by its former manager, subject, however, as to control of funds, territory, prices and competition, to a central management. All profits were pooled and a division thereof was made on the basis of stock assigned to each bakery. Under this arrangement the Biscuit Company secured the control and pooled the business of thirty-five leading bakeries in twelve different states, Klotz & Co. being one of the bakeries thus acquired. After the completion of this purchase, Klotz & Co. leased their bakery premises to the Biscuit Company for a term of years, Klotz becoming its agent on a salary. A short time afterwards (about six months) Klotz & Co. attempted to repudiate the sale and lease by resuming business under their firm name. The Biscuit Company thereupon filed a bill for an injunction, accounting, and the appointment of a receiver. Klotz et al. filed an answer and cross-bill, asking a rescission of the entire transaction, i. e.: the sale and the lease, tendering the stock which had been received by them as the consideration for the sale. The application for receiver was refused, because:

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(1) Where the appointment of a receiver will aid an illegal combination in carrying out its purposes, and a refusal to make such appointment will not result in serious and permanent injury, a court of equity will not appoint a receiver;

(2) The appointment of a receiver is an interlocutory remedy, which courts grant or withhold according to a discretion conscientiously exercised upon a consideration of all the facts which a cause presents, involving the rights of the parties and the interests of the public;

(3) Where the formation of a corporation is a part of a plan to create a monopoly in a particular business, the title to property acquired by such corporation for the purpose of perfecting such monopoly may be inquired into before it will be granted relief in equity; and

(4) Where the facts before a court disclose an illegal transaction, in determining the rights of the parties thereunder, a court will go into such transaction, although neither of the parties before it question such illegality.

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## AMERICAN FIRE INSURANCE CO. v. STATE.

(75 Miss. 24, 22 So. 99, 1897.)

### Pleading; Injury.

This was an indictment of twenty-nine domestic and one foreign fire insurance companies for conspiring to and placing the control of fire insurance business, to the extent of fixing and prescribing fire insurance rates and premiums, in certain trustees of an association called Southeastern Tariff Association. It was held that:

(1) An indictment, charging the offense created by section 4437 and punished under section 1007, Code 1892, must aver that the effect of the trust was to injure either the public or some particular person or corporation in the state; (22 So. 103)

(2) The venue in an indictment for conspiracy may be laid "either in the county of the original unlawful confederation, or in that wherein any overt act pursuant thereto transpired;" (p. 102)

(3) For the purpose of tolling the statute of limitations "every overt act is a renewal of the original conspiracy then and there,—a repeating of the conspiracy as a new offense;" (p. 102) and

(4) That the business of insurance is embraced within the act prohibiting trusts. (p. 104)

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## AMERICAN HANDLE COMPANY, LIMITED v. STANDARD HANDLE COMPANY.

(59 S. W. 709, Tenn. 1900.)

### Tendency of Combination; Cause Arising From Unlawful Combination.

This was a general creditors' bill brought by American Handle Company, Limited, on behalf of itself and other creditors, against the Standard Handle Company, a New York corporation, to enforce payment of an indebtedness. A cross-bill, attacking said claim, was filed by creditors. It appeared that for a number of years prior to October, 1895, the Standard Handle Company had been engaged at Knoxville, Tennessee, in the manufacture and sale of certain handles, and that the Harrisburg Handle Company, a Pennsylvania corporation, had been conducting a similar business at Bristol, Tennessee; that the two manufacturing corporations were active competitors in said business; that on or about said date the principal owners of the Standard and Harrisburg Companies organized two Tennessee corporations—one under the name of Harrisburg Handle Company, the other by the name of the American Handle Company, Limited; that the Harrisburg Handle Company of Tennessee was organized for the purpose of securing and did secure a lease of the properties of the Harrisburg Handle Company of Pennsylvania; that one of the purposes of the American Handle Company, Limited, was to sell eighty-five per cent. of the products of the two manufacturing companies—the Harrisburg Handle Company of Tennessee and the Standard Handle Company—and that the American Handle Company, Limited, did, in fact, purchase and sell exclusively all of the products of

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said manufacturing companies, handling the entire output of said companies at a uniform price agreed upon in advance between said three companies; and that the two manufacturing companies pooled equally the profits arising from the sale of said products. The manufacturing companies referred to controlled between nine and ten per cent. of their manufacture. The Pennsylvania Harrisburg Handle Company went entirely out of business. The Standard Handle Company being insolvent, a claim was sought to be collected through a creditors' proceeding. This claim arose out of the dealings between the American Handle Company, Limited, Standard Handle Company and the Tennessee Harrisburg Handle Company. It was held that:

(1) To bring a combination within 1891 Tennessee anti-trust laws it is sufficient if the arrangement has the effect or tendency to monopolize trade and control prices;

(2) The presence of an express purpose to form a trust or combination sought to be declared illegal or the existence of a purpose to create a monopoly at the time of forming such combination is not necessary where the statute prohibits combinations having a tendency to monopolize trade;

(3) An agreement between two manufacturing corporations and one selling corporation whereby the entire output of the two producing corporations is put in the hands of the third or selling concern at the same price, which product is intermingled by the selling company as the goods of one concern and placed upon the market at one standard price, tended to stifle competition, to control prices, and came within 1891 anti-trust laws, although each manufacturing corporation ran its own plant and there was no agreement whatever as to price of raw material entering into the manufacture of said product;

(4) It is unnecessary that an actual agreement or understanding between corporations to violate anti-trust laws shall be established or that such an agreement was authorized by corporate action shall be proved where the illegal plan is conceived by a common representative, is by him for-

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warded and carried out in behalf of the corporations whose stockholders receive the benefits from such plan;

(5) Where a claim arises out of an agreement or understanding which amounts to a monopoly or a trust prohibited by anti-trust laws of 1891, this is a good defense to an action based upon such claim, and under section 5, said laws, the defense exists if the cause of action originated or grew out of the business or transaction of an unlawful combination, it being not necessary that the action should have arisen technically in the performance of the prohibited contract or arrangement; and

(6) Where a contract sued upon arises out of an illegal combination there can be no recovery based upon it even for the benefit of creditors, in the absence of proof showing who the creditors are and whether these are *bona fide* and disconnected from the illegal combination.

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## AMERICAN PRESERVERS' CO. v. NORRIS et al.

(43 Fed. 711, U. S. C. C., Mo. 1890.)

See American Preservers' Trust v. Taylor Mfg. Co., 46 Fed. 152.



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## AMERICAN PRESERVERS' TRUST v. TAYLOR MANUFACTURING CO.

(46 Fed. 152, U. S. C. C., Mo. 1891.)

### Corporate Partnership; Agency; Injunction.

American Preservers' Company, as assignee of American Preservers' Trust, sought to restrain Taylor Manufacturing Company and others from breaking their covenant not to manufacture preserves. When this case was before the court on a motion for a preliminary injunction (43 Fed. 711, 1890) the writ was refused for lack of allegations showing that the Taylor Manufacturing Company was a party to a certain agreement and covenant charged to be violated. The bill was thereupon amended. As thus amended, the case came up for disposition on general demurrer.

From the pleadings and affidavits it appeared that Taylor and Norrises were the principal stockholders of Taylor Manufacturing Company, a Missouri corporation, and as officers and directors had full control of said company; that in March, 1888, all of the defendants, including Taylor Manufacturing Company, agreed to form an association under the name of American Preservers' Trust, to be composed of a large number of firms and corporations engaged in the fruit-preserving business; that subsequently Taylor Manufacturing Company conveyed to Taylor and Norrises all its property, consisting of machinery and tools for the manufacture of preserves, as well as all of its trademarks and brands in use in that business; that afterwards Taylor and Norrises transferred the same property to St. Louis Preserving Company, organized under the laws of Missouri, by the trustees of the Preservers' Trust; that in consideration of this transfer Taylor and Norrises received trust cer-

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tificates with an option to repurchase them within a definite time; that at this time Taylor and Norrises covenanted with the St. Louis Preserving Company that so long as the trust existed they would not, either directly or indirectly, engage in the manufacture of preserves, etc., within twenty miles of the city of St. Louis, and that they would not buy or deal in such articles unless they had been prepared by persons or corporations concerned in the trust; that a year afterwards Taylor and Norrises, electing to sell said trust certificates, the trustees in said trust promised to find a purchaser and at the same time required them to sign, and one of the Norrises and Taylor did sign, a covenant not to engage, be employed or become interested, either personally or by representative, pecuniarily or in any manner, except through the medium of the American Preservers' Trust, in the manufacture or sale of preserves, etc., or in any way to obstruct the work of said trust or in any manner assume a position adverse thereto, but at all times and in every way to give it cordial support, etc., for the period of twenty-five years or until the earlier termination of said trust in the manner provided by the terms of the agreement of the association; and that the American Preservers' Trust was originally formed under a trust agreement or articles of association by stockholders of seven foreign corporations engaged in the fruit preserving business, and located in different parts of the United States. The trust agreement authorized the trustees (1) to prepare and issue trust certificates for stock, bonds, or other property at any time transferred or assigned to them, such certificates to be based on the estimated earning capacity of the property so acquired; (2) to purchase the stock, bonds, property, or business of any corporation or firm engaged in the fruit preserving business that was not originally concerned in the trust; (3) to lease the property of any such company or firm; (4) to organize corporations to carry on the fruit-preserving business; (5) to exercise control over corporations by means of the acquisition of their stock; (6) to

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sell any trust property in their possession, other than stocks, and to receive the purchase money; and (7) to receive and collect dividends on stocks, and interest on bonds, and out of the money so received on account of sales, dividends, or interest, after paying the expenses of the trust, to declare dividends on the trust certificates, which they had themselves issued and put in circulation. The agreement was to take effect sixty days from the time those holding a majority of the stock of the seven corporations should have transferred their stock to a board of nine trustees, six of whom were mentioned by name. All of the rights of the American Preservers' Trust were assigned to American Preservers' Company, a West Virginia corporation. It was held that:

(1) A Missouri business corporation has not the power to enter into a partnership arrangement with other corporations, associations and individuals appointing and empowering common agents in behalf of such associated companies to manage their affairs, to buy and lease property throughout the United States, and to acquire and exercise entire control over other corporations;

(2) A contract made and executed by stockholders of a corporation with its consent and for its benefit is the contract of the corporation and not that of its stockholders;

(3) A corporation is bound by a stockholders' agreement entered in its behalf where the corporation had authorized the making of such agreement and had received the benefits therefrom;

(4) Under the circumstances of the case the separate agreements involved depended on one consideration; and

(5) Equity will not enforce the specific performance of an agreement which is inequitable, or is tainted with illegality, or is in excess of corporate powers.

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## AMERICAN STRAWBOARD COMPANY v. PEORIA STRAWBOARD CO.

(65 Ill. App. 502, 1895.)

**Contract as Part of Unlawful Combination; Lease.**

This was an action for alleged rental of premises under lease and guaranty and for price of materials sold and delivered. The transaction of which the lease was a part consisted in reducing the production of strawboard and thereby raise prices. For this purpose two organized sets of strawboard manufacturers caused the incorporation of a company which was to and did lease a large number of strawboard plants, and after leasing them the plants were partially or wholly shut down. Judgment was rendered against the lessee for $27,881.02, which judgment was reversed, the court holding that:

(1) The lease or contract was void because "entered into knowingly and purposely as a part of an unlawful combination for the purpose of limiting the production of an article of merchandise and fixing the price thereof, in violation of the plain terms of the statute;" (65 Ill. App. 526)

(2) A void contract cannot be made the basis for recovery on it; (p. 527)

(3) Information of the illegal character of a course of dealing acquired by officers of a corporation and acts performed by them in pursuance of such course bind the corporation when obtained and done in the usual course of the corporation's business; (p. 525) and

(4) Under the evidence there was no use and occupation for which the pretended landlord could recover, no actual possession by the lessee having been taken under the lease in question. (p. 528)

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## NOTE.

On the point that a void contract is unenforcible even if it is executed by one of the parties and nothing remains for him to do but to pay a fixed sum of money, the decision is not satisfactory for the reason that the evidence in this case showed clearly an incompletion of the unlawful arrangement, so that in reality the claim that the contract or lease sued upon was executed was not established.

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## ANDERSON v. JETT.

(89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390, 1889.)

### Combination; Destroying Competition.

This was a suit for damages on account of an alleged breach of contract between two competing boat owners who agreed, in order to stop rivalry in their business, to pool in fixed proportions the net profits earned by each. Each boat was to bear its own expenses. In case of a sale of either boat, the boat sold was to be replaced by another and the owner of the selling boat was not to engage again directly or indirectly in the trade for one year thereafter. It was held that:

A contract between two carriers which has the effect of destroying all incentive to competition and which tends to increase charges is void as against public policy.

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## ANDERSON et al. v. SHAWNEE COMPRESS CO. et al.

(87 Pac. 315, Okla. 1906.)

**Restraint of Trade, Contracts, Validity; Corporations; Appeal and Error.**

The Gulf Compress Co., an Alabama corporation, with a capital stock of $25,000, was engaged in the compression of cotton for hire. Within 18 months of organization of said company its capital stock was increased to $1,000,000, an amount then sufficient to purchase, or otherwise absorb almost all, if not the entire, business of cotton compression in the United States. It held $600,000 of this $1,000,000 as treasury stock for convenient use. This company, with the Atlanta Company, controlled and operated fifty-two compresses, owning but six of these, and holding the remainder under a lease similar to that about to be made by the Shawnee Compress Co. The surplus earnings of both companies were not distributed, but were held for the acquisition of the most important plants, in furtherance of a general policy to absorb the entire business of compression of cotton. The Shawnee Compress Co., an Oklahoma corporation, was organized with a capital stock of $50,000. In order to transfer the control of this company, two of its stockholders procured a reduction of its board of directors from nine to three. A meeting was then held by the new board of directors, at which a majority authorized the leasing of the entire property of the Shawnee Compress Co. to the Gulf Compress Co. for a period of five years, at a stipulated rental of $6,000 per annum, the proposed lease providing that the landlord shall not, during the term of said lease, without the tenant's consent, directly or indirectly, engage in the compression of cotton within fifty miles of any plant operated by the

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tenant; that the landlord pledge the tenant its good will, moral and real support, and that it individually and collectively, render the tenant every assistance in discouraging unreasonable and unnecessary competition; and that the tenant agree to in no way use its other compresses to the detriment of the Shawnee Compress Co. during the term of said lease. At said meeting A, a minority stockholder of the Shawnee Compress Co., protested against the leasing of said property, on the ground that no valid reason for such leasing existed, and that the intention of the Gulf Compress Co., in procuring said lease, was to secure a monopoly of the compress business, and to restrict competition between the compresses already operated by it, contrary to public policy and in undue restraint of trade. To enforce this protest A instituted a proceeding by petition, in which the foregoing, among other facts, were set up, praying that the lease or contract entered or about to be entered into by the Shawnee Compress Co., or in its behalf, should be declared void, and that said majority of directors, said company, and its officers, be enjoined from acting in the premises. There was a special answer to this petition, and a demurrer to the same. The demurrer having been overruled, a general denial was interposed. The trial resulted in a judgment, for the defendants, dissolving a temporary injunction and dismissing the petition. In reversing this judgment, it was held that:

(1) A provision in a lease of the entire property of a corporation, that the grantor (landlord), individually and collectively, shall not during the term of the lease, without the tenant's consent, directly or indirectly, engage in its business within fifty miles of the plant operated by the tenant, practically unlimited as to territory,—is in unreasonable restraint of trade, and therefore void; (87 Pac. 319)

(2) While it is lawful for one engaged in any business or occupation to sell out his stock in trade and good will and to contract with the purchaser not to engage in the same business in the same place for a limited time; yet when the

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contract encroaches upon the rights of the public and transgresses the liberty of free competition, consideration for the public welfare becomes paramount, and predominates over any individual right to contract, vitiating the contract obligation, or portion thereof in general restraint of trade having such an effect; (p. 317, *et seq.*)

(3) Each case involving restraint of trade depends upon its own circumstances; (p. 317)

(4) Whether a particular contract or provision is or is not in general restraint of trade depends upon the situation of the parties, the nature of the business, the interests touched by the restrictions, and the effect of the contract upon the rights and welfare of the public; (p. 318)

(5) In determining the legality of a contract in restraint of trade, the material consideration is its injurious tendency, and not whether it was entered into with any evil intent; (p. 317½)

(6) When the result of a contract tends toward monopoly and to deprive the public of the advantages derived from free competition, it is sufficient to vitiate such contract; (p. 317)

(7) When a part of a contract is unlawful as being in general restraint of trade, and the contract is founded upon one entire consideration and affords no means of apportionment, the entire contract is invalid; (p. 319½)

(8) A contract made in aid of an illegal combination is void as against public policy; (p. 318½)

(9) In the absence of express corporate authority to lease, a strictly private corporation has the implied power to lease its entire property for a term of years whenever it cannot itself profitably continue operations; (p. 316)

(10) Whenever an appellate court is required to construe a contract, its validity is necessarily involved; (p. 317) and

(11) A case will not be reversed for want of sufficient evidence when the record contains some evidence to support the finding of the trial court. (p. 317)

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## ANDERSON v. UNITED STATES.

(171 U. S. 604, 43 L. ed. 300, Mo. 1898.)

**Trade Associations; Regulating Manner of Conducting Business, Not Unlawful.**

This was a bill brought under the Sherman Act to enjoin members of a voluntary unincorporated association of live stock purchasers and commission merchants from carrying out the objects of the association, which were to promote the purchase and sale of live stock at Kansas City stock yards among its members only by furnishing constant buyers for cattle shipped to the market and to raise the standard of business integrity among its members. Active competition among the members of the association was not interfered with. General purchasers and sellers of live stock not in the commission business were not prevented from buying and selling live stock. The organization neither restrained nor interfered with local or interstate commerce. No pecuniary business whatever was transacted by the association as such. It was held that:

An arrangement or agreement is valid where only the manner of transacting business of the parties entering into it is regulated, and such business is not controlled with reference to prices and competition, and "where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object." (43 L. ed. 306.)

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## ANHEUSER-BUSCH BREWING ASSOCIATION v. HOUCK.

(27 S. W. 692, 88 Tex. 184, 30 S. W. 869, 1894 and 1895.)

### Combination, Manufacturer and Dealer.

After a brewer had contracted with a wholesale beer dealer for the exclusive sale of half of the beer to be sold by him in a certain locality for a limited period, the dealer entered into a so-called partnership agreement with two other like dealers, who constituted all the dealers within said locality. Under this partnership arrangement all of the dealers turned into one common mass and managed, under one management, their entire stock. Each so-called partner drew a fixed salary. The profits arising out of the joint business were divided among these partners in certain proportions. A breach of the contract between the brewer and the first dealer caused a dissolution of the partnership; and there being due said brewer a sum of money from the dealer, the latter was sued. The dealer sought to offset and counterclaim his damage sustained by said breach. In construing the two contracts it was held that:

(1) A contract between a manufacturer of a commodity and dealer therein under which, within a certain locality and for a limited period, the one sells such commodity in bulk exclusively to the other who purchases the same at a fixed price, when this will enable the dealer to effect and carry out a monopoly in such commodity known to the manufacturer or his duly authorized agent, is void as against public policy; (30 S. W. 870)

(2) An agreement between all the dealers in an article of prime necessity or in general use, whereby its supply is controlled, its price is regulated in a given community or mar-

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ket, and competition between such dealers in respect to it is prevented entirely, is against public policy; (27 S. W. 695)

(3) Whether an agreement is or is not in restraint of trade is a question for the court and not the jury; (27 S. W. 697)

(4) Where a contract is void as against public policy, there can be no breach of it that could support a claim for damages; (27 S. W. 697) and

(5) There can be no recovery for goods sold under an exclusive contract of sale, where the seller or his duly authorized agent knows such contract is aiding the buyer to engage in an illegal combination in restraint of trade. (30 S. W. 870)

NOTE.

The contract referred to in point (1) was held to be lawful by the court of civil appeals, but was condemned by the supreme court.

Point (5) was decided the other way by the court of civil appeals.

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## ARENTS et al. v. BLACKWELL'S DURHAM TOBACCO COMPANY et al.

(101 Fed. 338, 109 Fed. 1058, U. S. C. C. and C. C. A., N. C. 1900–01.)

### Corporate Dissolution, Equity Jurisdiction; Sales; Illegal Transactions.

The Blackwell's Durham Tobacco Company, a North Carolina corporation, had a capital stock of $4,000,000, divided into 160,000 shares of the par value of $25 each. Arents and others owned 159,769 shares; W. A. Guthrie held one share; Kate A. Watkins owned 36 shares, and the remaining 194 shares were held by parties whose residences were unknown. In a bill by Arents and others, representing the 159,769 shares of stock, it was substantially alleged that the American Tobacco Company had offered to purchase the entire property of the Blackwell's Durham Tobacco Company as a going concern for the sum of $2,800,000, subject to acceptance within ninety days from February 28, 1900; that the price offered was a fair one; that the stock of the company having no fixed market value, and not being listed on any stock exchange, the complainants, if put to the alternative of a sale of their stock, would be compelled to sell it at a great sacrifice, whereas the present offer would furnish a sale at full value; that in any event, said offer could be used as an upset price, if the court preferred a public to a private sale; that the proposed purchaser, the American Tobacco Company, was a perfectly solvent corporation, able to keep and to make good said offer; that the complainants holding 99½ per cent of the whole stock and desiring to withdraw from their business, the remaining stockholders could not conduct it profitably; that it was impracticable for the Blackwell's Durham Tobacco Company to accept the said offer and to make said sale for the reason that it was impossible to reach all

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of the outstanding stockholders, and secure their assent and approval of the sale, and, also, because W. A. Guthrie, a stockholder holding only one share, purchased the same for the purpose of doing all in his power to harass, annoy, vex, and destroy the corporation, and make the management of its business impossible; that Guthrie was a lawyer and politican of prominence in North Carolina, and had published in its newspapers his purpose of introducing a bill in the legislature of North Carolina, at its approaching session, to repeal the charter of said corporation, and to put it in the hands of trustees to wind it up; and that he also threatened, if this attempt should fail, to carry the question into the politics of the state, and to agitate it until he succeeded. The prayer of the bill was for a dissolution and winding up of said corporation and for the appointment of a receiver. A temporary receiver having been appointed, an injunction and rule issued requiring the defendants to show cause why the receivership should not be made permanent. W. A. Guthrie was the only defendant who made return to said rule by way of answer, claiming that the complainants were officers and employees of the American Tobacco Company, who was the real owner of the stock standing in the name of complainants; that the American Tobacco Company under its charter could not purchase or hold stock in another corporation; that the real price for the Blackwell's Durham Tobacco Company's stock was $6,000,000, instead of $2,800,000; that in North Carolina a solvent going corporation could not be dissolved by proceedings at the instance of the company, a corporator, or a creditor, except for one or more of four causes,—abuse of its powers, two years' non-user of its powers, insolvency, and conviction of a criminal offense (if such an offense be persistent); that subject to the foregoing exceptions, the legislature alone had authority to dissolve such a corporation and distribute its assets; that the complainants, as a majority of stockholders, did not have the right to direct a conveyance and sale of the property and assets of the Blackwell's

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Durham Tobacco Company; that the court had no jurisdiction to grant the relief asked; that no meeting of the corporation had been held to consider the plan proposed by complainants; and that the dominating reason for the purchase of the entire plant, property and good will of the Blackwell's Durham Tobacco Company was to remove the only formidable competitor left of the American Tobacco Company, alleged to have been created for the purposes of monopolizing the manufacture of tobacco, controlling the purchase and sale thereof, and driving out all other competitors, by purchase or merger, thereby increasing the price of tobacco to consumers and producers. In making permanent the appointment of the receiver and ordering the case to be referred to a master to take testimony, it was held that:

(1) As a general rule the general jurisdiction of equity over corporations does not extend to the power of dissolution of the corporation or to the winding up of its affairs, sequestrating the corporate property and effects, and in that connection appointing a receiver, unless such jurisdiction is expressly conferred by statute; (101 Fed. 344)

(2) But where a private trading corporation ceases to be profitable or becomes exposed to the danger of insolvency, such corporation may be dissolved in equity at the instance of a majority of the directors having the largest interests at stake; (p. 346)

(3) The dissolution of a private corporation, and the sale and distribution of all of its property at the instance of a majority of stockholders, are not affected by the fact that the purchaser of the assets of such corporation may be an illegal combination; and

(4) While the principle that courts will refuse their aid to illegal combinations or to advance an illegal transaction is well established, yet where the main object for which a court's jurisdiction is invoked is a lawful one, and the result of such action will indirectly aid an illegal combination or transaction, courts will not refuse their aid.

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## ARNOT v. PITTSTON & ELMIRA COAL CO.

(68 N. Y. 558, 23 Am. Rep. 190, 1877.)

### Contract, Against Public Policy.

This was an action for the alleged price of coal sold and delivered. In defense the contract of sale was claimed to be against public policy and illegal. This contract was between a producer and dealer of coal, the latter agreeing to take all the coal, specifying a large amount, the former should send into the state, the former agreeing, as part of the contract and forming a single consideration, not to sell coal to other parties in the state. The sole object of such contract was to control the shipment and supply of coal in an extensive market, to maintain an unnatural high price for coal in that market, and to prevent competition in the sale of coal therein. It was held that:

(1) Contracts or arrangements which seek the suppression of the supply of necessary commodities from the markets in order to artificially enhance prices are against public policy and void; (23 Am. Rep. 194)

(2) Contracts against public policy are unenforcible; (p. 194)

(3) A vendor under a contract void as against public policy cannot recover even for goods sold and delivered, when the sale was made in aid of the illegal scheme which formed the only consideration for it, and he must rely on his contract to establish the vendee's liability; (p. 194)

(4) Under the facts of this case there was no rescission of the contract; (p. 197) and

(5) A straight sale of all of a vendor's product is legal, although he knows the vendee's object in purchasing is to obtain a monopoly of the article. (p. 195)



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## ATLANTA v. CHATTANOOGA FOUNDRY & PIPE CO. MANION et al. v. SAME.

(101 Fed. 900, U. S. C. C., Tenn. 1900.)

### Damages; Limitations.

These were two actions, one by the city of Atlanta, the other by Manion against Chattanooga Foundry & Pipe Company, for damages based upon section 7 of the Sherman Act. The damages claimed were the estimated difference between the just and fair market price for manufactured goods and the price actually paid by reason of an alleged unlawful combination of manufacturers of cast-iron pipe and fittings. The particular combination was the same as that involved in Addyston Pipe & Steel Co. v. United States. The Tennessee statute of limitations was pleaded in bar to these actions. On demurrer to these pleas, it was held that:

(1) An authorized action for violation of a statutory provision is penal when the same must be brought by or in behalf of the state whose laws have been broken. (101 Fed. 903.) One of the rules of construction applied in this case was that "when a statute inflicts punishment by way of fine and imprisonment at the suit of the state for a public wrong affecting the whole community, and also confers a remedy on a party for private injuries resulting from breaches of the the statute the latter will not be regarded as a penalty unless the statute so declares;" (p. 906)

(2) The action authorized by section 7 of the Sherman Act is compensatory and remedial and not penal in its nature; (pp. 904, 906)

(3) In absence of a Federal statute of limitations a cause of action will be limited by the limitation provided for the

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class of actions to which it belongs in the state where the action is brought; (pp. 902, 910)

(4) The state statute of limitations governing actions brought under section 7 of the Sherman Act is section 4470, prescribing a period of three years as a bar to such suits; (p. 910)

(5) The injury for which damages are awardable under section 7 of the Sherman Act must be either to interstate business or property; (p. 907)

(6) A statute in case of a violation of its provisions may award punitive damages to the injured person; (p 905) and

(7) An action of trespass on the case will lie "for every civil wrong to chattels personal, whether corporeal or incorporeal, and whether the injury was direct and immediate or indirect and consequential." (p. 908)

NOTE.

The first of the foregoing cases was subsequently reviewed by the circuit court of appeals. The case in that court is separately digested. At the trial in the circuit court and in the circuit court of appeals the whole case turned as to what particular provision of the state statute of limitations applied. Point (4) in the foregoing cases was expressly overruled.

As to distinction between civil and penal actions see further leading case of Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123.

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## ATLANTA v. CHATTANOOGA FOUNDRY & PIPE WORKS.

(127 Fed. 23, U. S. C. C. A., Tenn. 1903.)

### Damages; Limitations.

This is one of the cases that were before the circuit court in 1900 (101 Fed. 900). Upon overruling of the demurrer to pleas in bar to the actions in those cases, the foregoing case was tried on a plea of general issue of not guilty. At the conclusion of all the evidence the jury was instructed to find for defendants. This instruction was assigned as error and the case brought on writ of error to the circuit court of appeals. It was there held that:

(1) The action authorized by section 7 of the Sherman Act is an action on a statute liability, and under the Tennessee statute of limitations applicable thereto (sec. 4473, Shannon's Code), such an action is not barred for ten years; (127 Fed. 32)

(2) The action authorized by section 7 of the Sherman Act is remedial and not penal; (pp. 28, 29)

(3) One is entitled to damages under section 7 of the Sherman Act for an injury to his business resulting from the suppression of competition in a commodity which is the subject of an interstate contract, regardless of whether he is or is not generally engaged in inter or intra-state business; (p. 27)

(4) Under section 7 of the Sherman Act damages can only be recovered in a direct proceeding; (p. 28) and

(5) Each member of an illegal combination is responsible for the torts committed through such unlawful combination. (p. 26)

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## ATTORNEY GENERAL v. A. BOOTH & CO.

(143 Mich. 89, 106 N. W. 868, 1906.)

**Quo Warranto; Jurisdiction; Practice; Foreign Corporations.**

On relation of a copartnership an information in the nature of a *quo warranto* was filed by the attorney general against A. Booth & Co., attacking its corporate existence and right to do business in Michigan. The respondent pleaded its lawful incorporation in a foreign state, its full compliance with Michigan foreign corporation laws, and denied the right of Michigan courts to question the legality of its franchise granted by the state of incorporation. The state replied, setting up: (a) the anti-trust laws of the state of respondent's incorporation; (b) the condition of the trade that existed prior to respondent's alleged pretended incorporation; and (c) respondent's subsequent entry into a combination to fix and limit the commodity in which respondent dealt. The carrying out of the combination's object was pleaded with some detail. Thereupon respondent moved the court, upon numerous objections, to dismiss the proceedings. This motion was denied, the court holding that:

(1) Under sections 2 and 3 of 1899 Act of Michigan against monopolies, a *quo warranto* proceeding may be commenced in the supreme court without previously instituting a suit or suits in the circuit court; (106 N. W. 871½)

(2) According to Michigan practice in *quo warranto* proceedings leave to file an information may be waived; (p. 871)

(3) Where a *quo warranto* is brought in the name of the people or its duly authorized officer, the name of a private relator is mere surplusage; (pp. 871, 872)

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(4) A foreign corporation's right to do business within a state may be questioned by *quo warranto;* (p. 873)

(5) One of two or more persons or corporations illegally combining or conspiring may be prosecuted alone irrespective of whether his or its co-contractors or co-conspirators are within reach of the law or not; (p. 872)

(6) A replication in the nature of avoidance of a *prima facie* defense set up in a plea is permissible; (p. 872)

(7) A formal contract or agreement between two or more persons or corporations to create an illegal combination need not be pleaded, but may be inferred from circumstances; (p. 872½) and

(8) Where a corporation is organized pursuant to, and afterwards carries out, an illegal scheme to combine different independent interests for the purpose of creating a monopoly, such corporation comes within anti-trust laws, although it is regularly and formally organized. (p. 872½)

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## BAILEY v. ASSOCIATION OF MASTER PLUMBERS OF THE CITY OF MEMPHIS.

(103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561, 1899.)

### By-Laws in Restraint of Trade.

An organized non-profit association of a majority of Memphis master plumbers adopted a by-law fining a member of the association a graduated sum when competing with another member. Bailey, having been fined under this by-law, and failing to pay same, was sued by the association to enforce payment. In defense this by-law was claimed to be invalid. In the lower courts judgment went against defendants. On appeal, the judgment was reversed, the court holding that:

(1) Contracts, agreements, arrangements or combinations in whatever form or name, which tend to impair competition in trade and to enhance prices to the public's injury, are contrary to public policy and void; (46 L. R. A. 563)

(2) Contracts or other arrangements in restraint of trade are unenforcible; (p. 565)

(3) It is immaterial whether a contract or combination injurious to the public is in partial or complete restraint of trade; (p. 565) and

(4) A by-law is invalid unless it is expressly or impliedly authorized by charter or laws of incorporation. (p. 567)

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## BANCROFT et al. v. UNION EMBOSSING CO.

(72 N. H. 402, 1903.)

**Exclusive Contracts; Restraint of Trade, Sherman Act; Construction.**

May 6, 1899, a contract was entered into between B, C. and U E Co., whereby the latter were given exclusive right to manufacture and sell embossing machines and exclusive license under any letters patent which may be granted to B and C for inventions and improvements contained in or relating to said machines, for the full term for which any such letters patent may be granted, including any renewal, reissue, or extension thereof, whether obtained from the government of the United States or any foreign country, B and C agreeing that they would not during the existence of said contract make, vend, or use any embossing machines of a certain type; that they would give U E Co. all patterns and drawings which they had relating to such machines, and would furnish such drawings as may be necessary for the manufacture of the machines, and would give the benefit of their advice and co-operation in the manufacture of said machines so long as said contract should remain in force; that they would transfer to U E Co. all orders which they had then or may thereafter have for embossing machines of the described type, except two orders specifically named; that they would not during the existence of said contract in any way sell or assign any letters patent of the United States or any foreign country relating to said machines, or any improvement thereon, or grant any rights thereunder; and that said contract should continue for the full term for which any letters patent, upon the application of B and C, were, or may be granted, including any renewal, reissue, or extension thereof, and if no such patent should be

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granted upon said machine, then said contract should last for the term of twenty years from the date thereof. When this contract was executed, U E Co. had not procured a patent upon their embossing machine; but the parties believed that its principal feature was novel and a patent could be obtained which would control the manufacture and sale of the machines. It did not appear that a patent was ever issued or assigned according to the terms of said contract. May 27, 1901, B and C were notified that U E Co. would not be further bound by the contract. About the middle of the following July the patterns mentioned in the contract were returned to B and C, who did not assent to the rescission of the agreement. Subsequent to the notification, U E Co. manufactured nine machines, four of which were sold before the patterns were returned, and five of which were disposed of after that date. Claiming that the contract in question was rescinded, U E Co. refused to recognize B's and C's right to the price of said machines. B and C thereupon brought an action in assumpsit to recover $200 and interest thereon for each of the nine machines manufactured and sold by U E Co. At the trial it was ruled that there was such a failure of consideration as entitled U E Co. to rescind by putting B and C in the situation they occupied before the execution of the contract; that the right was exercised within a reasonable time, but that the rescission was not complete until the patterns were returned; and that B and C were entitled to recover the stipulated price for the four machines sold by U E Co. prior to the completion of the rescission. The court found a verdict for B and C in the sum of $892.33, being the price for four machines and interest thereon, and to this finding both parties excepted. In overruling these exceptions it was held that:

(1) The contract was not a mere license to manufacture and sell machines, but was a sale of the good-will in the business of manufacturing and selling machines; (72 N. H. 405)

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(2) "A contract granting an exclusive right to make and vend a machine is not void at common law as being in restraint of trade merely because it is unlimited as to locality, if it affords nothing more than fair and reasonable protection to the party in whose favor it is imposed; nor is it in contravention of the Federal statute designed to protect trade and commerce against unlawful restraints and monopolies;" (syl. 2)

(3) Covenants restraining competition, when made in aid of anything sold, are valid; (p. 409)

(4) The reasonableness of a contract in restraint of trade is a question of law and not of fact; (p. 409)

(5) The validity of a covenant in restraint of trade is to be determined by the protection the covenant affords to the party in whose favor it is made, and whether such protection is more than fair and reasonable; (p. 409)

(6) A contract in restraint of trade is not necessarily unreasonable and void if it is not limited as to space; (p. 406)

(7) Only direct restraints upon interstate commerce are within the prohibition of the Sherman Act; (p. 409) and

(8) The understanding of the parties at the time a contract was made is to be ascertained from the written contract, viewed in the light of the circumstances under which it was executed. (p. 404)

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## BARATARIA CANNING CO. v. JOULIAN.

(80 Miss. 555, 31 So. 961, 1902.)

### Contracts in Restraint of Trade.

J was sued by the Canning Company on a contract selling the company half of J's oysters during a certain period and prohibiting J from selling the other half of his oysters at different prices from those at which the Canning Company was to pay. This contract was pleaded in full in the declaration. A demurrer to the declaration was sustained. In affirming the judgment it was held that:

(1) A contract of sale binding the seller to sell a commodity to the *public* for the same price the buyer is purchasing half of it, regardless of supply and demand, is invalid under section 4437, Code of 1892, against trusts and monopolies; and

(2) Oysters are a commodity.

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## BARBER ASPHALT PAVING CO. v. BRAND et al.

(7 N. Y. Supp. 744, 1889.)

**Contract; Restraint of Trade; Pleading.**

The paving company was the assignee of a contract between Brand and Barber which contained a covenant "'not to sell asphalt to be used in the laying of sheet asphalt, street pavements, or in making asphalt blocks,' except to certain persons in Philadelphia, Baltimore, Washington and Brooklyn, for the use of their respective city." Upon breach of this covenant Brand and others were sued. On demurrer the declaration was held good, because:

(1) A restriction in a contract, otherwise founded upon a valid consideration, not to make nor sell a designated commodity to be used for a specific purpose, except to certain persons within a definite territory, is not in itself unlawful as being in restraint of trade; and

(2) Where a declaration states a lawful purpose for entering into a contract founded upon a valid consideration, the mere existence in the contract of a provision in partial restraint of trade will not render the declaration bad on demurrer.

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## BARTON et al. v. MULVANE.

(59 Kan. 313, 52 Pac. 883, 1898.)

**Replevin; Defense; Unlawful Trust.**

This was an action in replevin to recover possession of two boilers sold by H to B under a conditional sale contract. B gave H notes for the greater portion of the purchase price. H sold its interest in the contract and notes to P, who brought action against B. After commencement of suit P transferred his interest to M. B resisted recovery on the ground that M was a member of an unlawful combination between two *salt* companies. It was held that:

(1) Proof of a demand for the possession of goods wrongfully withheld and refusal before replevying them is unnecessary where the wrongdoer denies the owner's right to the goods or to its possession and a demand would be unavailing;

(2) The defense that a plaintiff is engaged in or is a member of a monopoly or illegal combination, and therefore is not entitled to recover in an action brought by or in behalf of such party, applies only to actions which promote the purposes of an illegal arrangement or scheme, or which grow out of the same, and are thus directly connected with it;

(3) Where there is no averment that a contract or transaction sued upon formed any part of an illegal combination, nor that the contract or transaction, in design or effect, promoted the alleged trust, it is proper to exclude testimony as to any unlawful combination; and

(4) Upon the facts of the case, the plaintiff, being entitled to possession of the property, had also a right to recover the usable value thereof between the commencement of the action and the time of the trial.

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## BEECHLEY v. MULVILLE.

(102 Ia. 602, 70 N. W. 107, 1897.)

### Conspiracy; Civil Actions.

Some thirty-five local insurance agents of Cedar Rapids and Marion, Iowa, including Beechley, the plaintiff, and two insurance companies, entered into a three-years' compact to fix rates upon all insurance risks within said territory. For this purpose a manager was appointed under bond and salary, who was (1) to pass upon all insurance policies, accounts, abstracts, reports and other matters pertaining to said business, (2) investigate irregularities, etc., and (3) to fine and enforce penalties for violation of the agreement or compact. Upon failure to pay fine within a stated time, provision was made for the taking away of the agency from the offending agent. Beechley, having violated this compact by writing insurance at less than fixed rates, was fined, and, refusing to pay the fine, the insurance companies for which he was acting took away from him their agencies. In a damage suit by Beechley for destroying his business through said compact or conspiracy, judgment was rendered against defendants, the trial court having refused to direct a verdict for them. The judgment was reversed, the reviewing court holding that:

(1) A conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give the right of action;

(2) Section 5454 of McClain's Code (sec. 1, c. 84, Acts 22d Gen. Assem.) against monopolies and trusts embraces insurance businesss; and

(3) The compact involved came within the provision of said section.

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## BEMENT & SONS v. NATIONAL HARROW COMPANY.

(186 U. S. 70, 46 L. ed. 1058, N. Y. 1902.)

**Contracts; Patents.**

This was an action for breach of a license contract containing numerous conditions, the principal ones being to limit production and sale of a certain patented article within specified territory, and to fix its sale at certain prices. The action was contested on the ground that the contract was void under the Sherman Act. The case decides:

(1) That it is a good defense to an action on a contract, that it was made in violation of an act of congress;

(2) That a patentee's rights under the United States patent laws securing to him a monopoly in the subject of the patent are not affected by the Sherman Act.

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## BIGELOW v. CALUMET & HECLA MINING CO. et al.

(155 Fed. 869, U. S. C. C., Mich. 1907.)

**Corporate Stock Ownership; Injunction; Jurisdiction; Practice.**

In pursuance of a policy of expansion, and for the purpose of creating a monopoly in the supply of "Lake copper," the Calumet & Hecla Mining Co., owning and operating the largest copper mining territory in the United States, purchased, within a few months before the date fixed for the 1907 annual meeting of a competing company, —the Osceola Company—a large amount of its stock, and acquired likewise a large number of proxies of other stock, keeping the knowledge of such purchase and acquisition from the management of the Osceola Company until the 20th of February, 1907 (twenty-two days before the proposed annual meeting). On this date the Calumet Company caused the transfer to it of said stock on the books of the Osceola Company. Immediately afterwards the Calumet Company took steps to secure the election of a board of directors for the Osceola Company and attempted to stop the management of said company in the making of future contracts. On the 12th of March, 1907, the president, and a substantial stockholder of the Osceola Company, brought a bill in equity to enjoin the Calumet Company from voting at said annual meeting the stock and proxies thus purchased and acquired, upon the ground that such transaction constituted an attempt to establish and maintain a monopoly of the business of mining, etc., contrary to the Sherman anti-trust act, the Michigan anti-monopoly law, and the common law. The bill, among other things, alleged that the Osceola Company was in active competition with the Calumet Company in producing and sell-

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ing said copper throughout the United States and in foreign countries; that each of said companies was engaged in interstate and foreign commerce; that the action of the Calumet Company in attempting to secure control of the Osceola Company, including the election of its board of directors, was a part of a general plan of the Calumet Company to secure control of practically the entire output of lake copper, and thereby secure a complete and absolute monopoly of said product throughout the United States, and that such purchase of stock and procurement of proxies was *ultra vires* and conferred no authority upon the Calumet Company to vote the same. The defendant company, by answer and affidavits, substantially submitted that if the acts complained of were unlawful, the remedy by injunction could be invoked only by the attorney-general of the United States, or the attorney-general or prosecuting attorneys of the state of Michigan; that if such injunctive relief could be given to a private party, it could be given only to the Osceola Company; that complainant, as a minority stockholder, had shown no right to act on behalf of the corporation; that no peculiar injury to complainant, actual or threatened, was alleged; and that, upon the face of the testimony presented, an injunction in advance of final hearing would be an unwarranted divesting of property rights and an unwarranted disturbing of the existing status. In granting a temporary injunction, it was held that:

(1) The purchase or acquisition by one corporation of a controlling portion of the capital stock of another competing company, for the purpose of suppressing competition and creating a monopoly, is within the prohibitions of the Sherman act and the Michigan anti-monopoly acts; (p. 874, *et seq.*)

(2) A transaction comes within the prohibition of the Sherman act, as well as of the Michigan anti-monopoly acts, if it tends to suppress competition or create a monopoly; (p. 875)



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(3) Whenever the policy of a state is against monopolies, a statute, authorizing the purchase or acquisition by one corporation of the capital stock of another company, is restricted to purchases that do not create or tend to create monopolies, as statutes must be read in connection with the expressed avowed policy of the state; (p. 875)

(4) Although injunctive relief under Federal anti-trust law is limited to suits brought for injuries common to the general public, such relief is grantable to a private party who has sustained special injury by violations of said act in a Federal court under the general equity jurisdiction; (p. 876, *et seq.*)

(5) Where the relief is sought for the benefit of a corporation, the complaining stockholder must show that he has exhausted all means within his reach to induce the corporation to take action, to the extent of formally making demand for action upon the board of directors, unless it appears that such demand would prove useless; (p. 879)

(6) If a corporation has secured a majority of the stock of another corporation, for the purpose of stifling competition and controlling the other company, the minority stockholders of the latter may maintain a bill to enjoin the former corporation from voting the stock it has illegally acquired; (224 Ill. 10, syl. 5)

(7) Injuries to a stockholder and director of a corporation resulting from the corporation entering into a combination or arrangement in restraint of trade, are distinct and separate from those suffered by the general public, and are properly termed irreparable; (p. 880) and

(8) Upon the application for a temporary injunction it is sufficient that the court be convinced by the pleadings and the evidence that the case presented is a proper subject for investigation in a court of equity, and an injunction should not be refused unless upon the balancing of convenience and inconvenience, to the one party or the other, an injunction appears inexpedient, especially when an order refusing the injunction is not appealable. (p. 881)

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## BISHOP v. AMERICAN PRESERVERS' CO. et al.

(51 Fed. 272, U. S. C. C., Ill. 1892.)

**Damages; Actions; Pleading.**

This case was decided on demurrer, which questioned the sufficiency of a declaration, stating substantially that in 1888 the plaintiff was engaged in the business of manufacturing preserves, etc., in the city of Chicago; that at the instance of others engaged in the same business he entered into an agreement with them for the formation of a trust or combination for the purpose of advancing and maintaining prices of such goods; that a trust or combination called the "American Preservers' Trust" was created for that purpose, the plaintiff becoming a member of it; that he conveyed his property and plant to said trust; that the managers of the organization caused the formation under the laws of West Virginia of a company for the purpose of conducting the business of said trust; that the plaintiff assigned and transferred his property used in his business to said company, the American Preservers' Company; that after he had so transferred his property to said trust and company differences arose between himself and the managers of said trust; that said trust known as the American Preservers' Company brought suit in replevin in one of the courts of the city of Chicago, and took possession of the plaintiff's property, plant, books, etc., used in the management of his business in connection with said trust; and that said American Preservers' Company has also brought suit at law in the Federal court against plaintiff, claiming $3,000. This declaration was held insufficient because:

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(1) During pendency of an action to declare a combination or contract illegal as in restraint of trade an action for damages claimed to have been incurred by or through such combination is premature; and

(2) The declaration in an action for damages, under section 7 of the Sherman Act, must show that the property or business injured is a subject of interstate commerce.

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## BISHOP v. AMERICAN PRESERVERS' CO.

(157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317, 1895.)

**Trade Restraint; Trust Agreement; Evidence.**

Before May, 1888, there existed a trust known as "American Preservers' Trust," whose expressed object was to secure co-operation in the manufacture and sale of all kinds of preserves. This trust was vested in nine trustees, who were to prepare and issue trust certificates showing each beneficiary's interest in the trust. Trust certificates were exchangeable only for property, bonds, stocks, money or businesses held or to be acquired by the trustees. Each subscriber to the trust agreement bound himself to assign absolutely to said trustees all of his capital stock of the corporation in which he was interested in return for trust certificates equal to the appraised earning capacity of his business. The transferred stock and bonds were to be held by the trustees and their successors for the beneficiaries of the trust, the trustees having the powers: (1) to sell all the property, but not the capital stock, of the *cestui que trust;* (2) to cause the formation of corporations for specified purposes; (3) as stockholders to elect either themselves or other directors and officers for the corporate members constituting said trust; (4) to keep and receive all moneys from dividends and interest upon stocks; (5) to declare and pay dividends; and (6) generally, to exercise supervision and control over all of the corporations or associations entering into said agreement. The trust arrangement also made provision for the keeping of books of account, holding of meetings of the beneficiaries and trustees, elections at such meetings, the employment of agents and attorneys, compensation for the trustees and other details and matter of form. This trust was provisionally to continue for twenty-five years.

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In May, 1888, Bishop, through alleged threats and persuasions, became a party to said trust agreement. In the following month the parties interested in the trust caused the organization of the American Preservers' Company under laws of West Virginia. To this company, in July of the same year, Bishop executed a bill of sale of all of his business, property and good will. It was claimed by the Preservers' Company that Bishop was accordingly appointed its agent and placed in possession of said property. Such possession constituted the only possession taken by the Preservers' Company. Bishop continued to operate the business under the names under which he conducted it previous to entering into the arrangement and the giving of the said bill of sale.

In May, 1891, the Preservers' Company brought an action against Bishop to recover possession of the properties alleged to have been conveyed to it under the bill of sale. The action was resisted on the ground that the formation of the American Preservers' Company and taking by it of said bill of sale were a part of an illegal trust arrangement, and did not divest Bishop of his title. Admission of testimony showing the illegal nature of the trust was refused by the trial court, which directed a verdict in favor of the plaintiff. A judgment in plaintiff's favor was accordingly rendered. This judgment was affirmed by the appellate court. In reversing the appellate and trial courts, it was held that:

(1) An agreement is against public policy and void where all the interests of a business are thereby combined and placed absolutely under a single management to monopolize and control trade; (157 Ill. 310, 312)

(2) The Illinois General Corporation Act prohibits corporate partnerships; (p. 313)

(3) A foreign corporation doing or attempting to do business in Illinois is subject to the same restrictions and duties as a domestic company; (p. 313)

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(4) The law refuses its aid to either of the parties to an illegal transaction when he can only establish his claim or defense by relying thereon; (p. 317)

(5) A contract void as against public policy is unenforcible even when executed; (pp. 317, 318)

(6) An agency having for its object or tending directly to promote the commission of an illegal act or an act against public policy is unenforcible; (p. 319)

(7) A copy of an instrument is admissible in evidence when the original is beyond the court's jurisdiction in the possession or under the control of the adverse party who, on proper notice, refuses to produce it; and

(8) Notice to produce a document may be given either to the adverse party or to his attorney. (p. 307)

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## BISHOP v. AMERICAN PRESERVERS' CO. et al.

(105 Fed. 845, U. S. C. C., Ill. 1900.)

### Damages; Actions.

In 1892 Bishop brought an action against the American Preservers' Company and others for treble damages under section 7 of the Sherman Act. A demurrer was sustained to the declaration, a report of the case appearing in 51 Fed. 272. The declaration was thereupon amended. A demurrer was again interposed. This demurrer was sustained on the ground that no damages could be recovered by a party to an illegal combination by which he claims to have been injured.

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## BLINDELL et al. v. HAGAN et al.

(54 Fed. 40, U. S. C. C., La. 1893.)

### Actions; Equity; Jurisdiction.

A crew made it impossible for alien steamship owners to engage another crew and proceed with their business. An injunction was thereupon asked to restrain the offending crew from its unlawful acts. It was held that:

(1) Chancery has jurisdiction, at the suit of a private person or corporation, to restrain an unlawful combination, where it is sought by such action to prevent threatened damage irremediable at law, and to avoid multiplicity of suits;

(2) At the suit of a private person or corporation, equity has no jurisdiction under the Sherman Act to restrain a combination of men who are interfering with trade or commerce; and

(3) The evidence before the court was sufficient upon which to base an injunction.

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## BOBBS-MERRILL CO. v. STRAUS et al.

(139 Fed. 155, U. S. C. C., N. Y. 1905.)

### Copyrights; Notice; Combination.

An assignee of a copyrighted book had printed on it below the statutory copyright notice the price of the book and an attempted warning that its sale by dealers at less than the fixed price would be treated as an infringement. A retailer, having purchased a large quantity of these books from a wholesaler, who presumably obtained the books direct from the assignee, proceeded to sell them at a reduced price from that stated in the notice. To restrain these sales said assignee brought suit in equity against the dealer. The defense was that the notice as to price was given in pursuance of a series of agreements, resolutions and understandings among New York and other state publishers under the name of the American Publishers' Association with book dealers throughout the United States, under the name of American Booksellers' Association to fix and maintain prices of books sold at wholesale and retail. It was held that:

(1) The notice on the book was insufficient to bind a dealer to sell at the price attempted to be fixed, there being no restriction on the notice as to title to the book or books when passing by sale from one to another; (p. 179, *et seq.*)

(2) There could be no infringement of a copyright where an owner had parted with the title to the copyrighted article, although when selling or conveying the article there is an agreement for restricted use; (p. 181, *et seq.*) and

(3) A combination between individual owners of patented or copyrighted articles or books to limit their production, control prices and stifle or prevent competition, is just as

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illegal as any other combination of owners of non-patented or non-copyrighted articles or books, having the same purposes. (p. 189, *et seq.*)

NOTE.

On appeal the decree dismissing the bill was affirmed on the ground that the complainant was "not entitled to relief either under the copyright statutes, or by virtue of the general powers of a court of equity;" the trust or combination question was entirely disregarded. (147 Fed. 15, 28, 1906)

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## BOHN MFG. CO. v. HOLLIS et al.

(54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, 1893.)

**Conspiracy; Retailers' Association; Injunction.**

From twenty-five to fifty per cent of lumber retailers in certain states, including Minnesota, formed and were members of a voluntary association for the purpose of preventing wholesalers or manufacturers in lumber from making sales directly to consumers or other non-dealers at points where members of the association were engaged in retail lumber business. To effect this object the members of the association agreed not to deal with any wholesaler or manufacturer who would sell directly to consumers at points where association members were dealing. A lumber manufacturer and dealer having sold lumber directly to a consumer, the association, through its secretary, notified him that he must pay to the association ten per cent of the amount of sale for the benefit of dealers deprived of trade by such sale. On refusal to comply with this request the association secretary threatened to notify association members of the manufacturer's violation of the rules of the association, which notice would have resulted in the members' refusal to deal with the manufacturer. Whereupon the manufacturer sought to restrain the secretary and other members of the association from sending or acting upon said notice. The trial court granted a preliminary injunction *ex parte*, and refusing to dissolve it, the case was appealed. In reversing the order and dissolving the injunction, it was held that:

(1) Unless a person is charged with a public duty or is prevented by contract, he is absolutely free to work for, or

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deal with, another, or refuse to do so, as he sees fit; (55 N. W. 1121½)

(2) Two or more may lawfully agree to do jointly what one may lawfully do singly; (p. 1121½)

(3) A lawful act does not become unlawful from improper motives; (p. 1121) and

(4) An injury is not actionable, unless it results from *unlawful acts.* (p. 1121.)

NOTE.

This case is apparently in conflict with Boutwell v. Marr, *supra,* 63, and Brown v. Jacobs Pharmacy Co., *supra,* 73, but when viewed with regard to the particular facts involved in these cases, there is no conflict.

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## BOOTH & CO. v. SEIBOLD et al.

(74 N. Y. Supp. 776, 1902.)

**Sales; Trade Restraint; Injunction.**

No facts are given in the report. The case was heard on a motion to continue an injunction *pendete lite*. In awarding the injunction to restrain a vendor from violating his contract not to engage in business within a specified territory for a definite period, it was held that:

(1) A vendor's covenant to refrain from prosecuting his business within a certain territory and for a definite period is not in general restraint of trade;

(2) A mere purchase and absorption of a rival's business and good will is not within anti-trust prohibitions;

(3) There was ample consideration for the covenant;

(4) Equity concerns itself with substance and not form; and

(5) Only parties to the contract or covenant are bound by it.

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## BOUTWELL et al. v. MARR et al.

(71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 803, 1899.)

### Conspiracy, Boycott; Damages; Evidence.

About ninety-five per cent of all the granite manufacturers at Barre were, in 1893, in a voluntary association called the Granite Manufacturers' Association. This organization was a local association of the Granite Manufacturers' Association of New England. In November, 1893, the local organization indorsed a resolution of the general association and adopted a resolution of its own, to the effect that none of the members of either associations patronize non-members. The non-compliance with this resolution was punishable by penalty. Prior to the time of the adoption of the foregoing resolution B was operating a granite mill in Barre. On several occasions, after the adoption of said resolution, B was approached by different members of, and persons connected with, said local organization to join it, but refused. As a result, the patronage of these members was withdrawn from B, and his business was entirely broken up, or ruined. B thereupon brought an action for damages against the members of said association, and recovered judgment against them. In affirming this judgment, it was held that:

(1) A criminal conspiracy consists of a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means; (76 Am. St. Rep. 749)

(2) The mere agreement to effect an illegal purpose, or to use illegal means, is punishable criminally; (p. 750)

(3) A civil action for conspiracy can be sustained only

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when, in furtherance of the conspiracy or agreement, damage is done to the complaining party through some unlawful act; (p. 750)

(4) Unity of action by many, obtained through coercion, causing injury to a third person, may convert an otherwise lawful act into one which is unlawful; (p. 750)

(5) Threats or intimidation by one or many, causing injury, is actionable; (pp. 750, 751, 752)

(6) The law concerns itself with substance, and not form; (p. 751)

(7) Exemplary damages against several defendants are recoverable only where all are shown to have been moved by a wanton desire to injure; (p. 753) and

(8) In an action for damages on account of destruction of a business through coercion by a voluntary association, it is admissible to show the purpose and use of the organization and its coercive character toward its members. (p. 753)

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## BOWEN v. MATHESON et al.

(14 Allen, 499, Mass. 1867.)

### Conspiracy; Pleading.

Persons engaged in keeping regular seamen's boarding-houses organized the "Seamen's Mutual Benefit Association of the city of Boston," a voluntary association. The constitution and by-laws of this organization prohibited admission to membership of any other than those keeping regular seamen's boarding-houses. Each member was, by this instrument, required, under penalty, to use his best endeavors to prevent his boarders from shipping in any vessel containing any crew that came from boarding-houses not in good standing with the association. The instrument also provided for a scale of wages or rates at which seamen were to be shipped by members, and for aiding each other in the collection of board bills. B, a shipping master, claiming to have been injured by members of said association, brought an action of tort against M and others, alleging, in substance, that the defendants conspired to prevent the plaintiff's obtaining any seaman as shipping master, to refuse to ship any seaman to him as shipping master, to refuse to allow any seaman boarding at their houses to ship with him at his shipping office, to prevent any seaman going in any ship for which he was acting as shipping master and agent, and to publicly notify merchants and shippers not to employ him, whereby they broke up his business. A demurrer to this declaration was sustained on the ground that it failed to allege illegal acts, the court holding that:

(1) In a civil action for conspiracy, the gist of the action is the damage done to the plaintiff; and



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(2) A declaration in a civil action for conspiracy must allege the commission of illegal acts.

NOTE.

For review and criticism of this case, see 41 S. E. 561, and 69 N. E. 1088.

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## BRADFORD & CARSON v. MONTGOMERY FURNITURE CO.

(92 S. W. 1104, Tenn. 1906.)

**Contracts; Vendor's Covenant; Release; Damages.**

B and C sold their furniture business to M, agreeing, as part of such sale, not to engage for three years in the same business at the city where it was conducted. In consideration of this covenant and the good will of said business, M executed their note in the sum of $3,000. Shortly afterwards M sold this business to a corporation, retaining a substantial interest in such company as stockholders. Before the expiration of said three years B and C engaged at same city in a similar business to that sold to M. In an action by B and C on said note, M claimed damages for said breach. The trial court dismissed the action. This judgment was reversed on appeal, the court holding that:

(1) Where an absolute and unconditional covenant is made by a seller of a business not to engage therein for a certain period at a specified place, such covenant accrues to the benefit of any person, copartnership or corporation succeeding to the purchaser's interest, for the reason that such covenant is a property right and assignable;

(2) A contract or agreement by a seller of a business not to resume the same business in the same locality for a specified time, when it goes no further than to afford a fair protection to the business purchased, and does not interfere with the general interests of the public, is not in restraint of trade;

(3) A severable contract, as distinguished from an entire contract, will support an action brought upon a breach of one of the conditions of such contract; and

(4) In case of a breach by vendor of his covenant not to engage in business, the vendee is entitled only to the natural and proximate damages caused by such breach, and when such damages cannot be proved, then he may recover only nominal damages.

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## BRETT v. EBEL.

(51 N. Y. Supp. 573, 1898.)

### Trade Restraint; Vendor's Covenant.

An action was brought to recover a sum of money under a contract selling the good will of a freighting business. The contract contained a stipulation against the vendor's engaging in business in specified territory during the life of the agreement. It was claimed in defense that the contract was void, because a good will without the property of a business could not be conveyed; also, for the reason that the contract was in violation of the Sherman anti-trust act. The trial court dismissed the complaint, but the judgment was reversed, the reviewing court holding that:

(1) The good will of a business is subject to sale independently of the property used in the business;

(2) A vendor's covenant not to compete with the vendee during a specified time in a limited territory is not against restraint of trade; and

(3) Such covenant is not within the Sherman anti-trust act.

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## BREWSTER v. MILLER et al.

(19 Ky. Law Rep. 593, 41 S. W. 301, 38 L. R. A. 505, 1897.)

### Conspiracy; Enforcing Collection of Debts.

One of the objects of a voluntary association of undertakers was the enforcement of the collection of just debts due its members for undertaker's services and material by prohibiting them to serve, or supply goods to, delinquent debtors. B, being one of these debtors, was refused such service by a member of the association. Whereupon he brought an action for damages against all members of the association and a manufacturer of caskets. The action was dismissed and judgment of dismissal was affirmed, the court holding that:

(1) In case of conspiracy, a civil action for damages is maintainable only when the injury results from some overt act done in pursuance of the conspiracy; and

(2) Neither the common law nor statute prevents a person individually or through an association from refusing to enter into contract relations with another.

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## BRIGHTMAN v. BATES.
## BRIGHTMAN v. DWIGHT.

(175 Mass. 105, 55 N. E. 809, 1900.)

### Contracts; Stockholders' Trust Agreement.

Brightman sued Bates and Dwight, for commissions earned in securing, on behalf of a syndicate, subscriptions to a majority of a railway company's capital stock. Defendants claimed that the covenant or agreement to compensate the plaintiff formed a part of another agreement, whereby a syndicate was to control the railway company by a committee of five subscribers with power to fill vacancies in the committee, voting annually the railway company's stock. The plaintiff was permitted to recover, the court holding that:

A majority of stockholders may transfer their stock to a trustee or trustees with unrestricted power to vote upon it.

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## BROOKLYN DISTILLING CO. v. STANDARD DISTILLING & DISTRIBUTING CO.

(105 N. Y. Supp. 264, 1907.)

**Landlord and Tenant, Rent; Construction, Contracts; Principal and Agent; Trust Defense.**

On the 28th of June, 1898, the Brooklyn Distilling Company leased its newly constructed plant to the Standard Distilling & Distributing Company for a term of three years from July 1, 1898, with a four years' option of renewal. After taking possession the lessee paid rent to and including November, 1899, when it refused to further pay rent, but kept possession of the premises. Whereupon an action was brought by the lessor to recover rent due and certain moneys advanced for taxes and insurance. The only defense to this action was that the leasing of the plant was in aid of the formation of a monopoly to prevent competition in a certain commodity, contrary to the laws of 1897, chapter 383. The trial resulted in a judgment against the defendant. In affirming this judgment it was held that:

(1) "A tenant who has gone into possession under a lease must either pay the rent which is due or vacate the premises;"

(2) A contract made with an illegal combination is not in its aid when the contracting party takes no part in the illegal combination and derives no benefit from it or the carrying out of its purposes;

(3) In determining the validity of a contract a party's motives for entering into it is immaterial;

(4) An agent's knowledge is not in law the knowledge of his principal when the agent is engaged in doing an act against his principal's interest, because the presumption is

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that the agent would not impart such knowledge to his principal; and

(5) The Anti-trust law of 1897 does not prohibit the selling or leasing of an entire plant to prevent competition.

## NOTE.

This case was argued before five justices of the supreme court, first department, in the absence of three associate justices. The majority opinion is by McLaughlin, J., concurred in by three other justices, including the presiding justice. Scott, J., dissented. His opinion is based principally upon the assumption that under all the circumstances of the case the evidence did not show that the agent was acting against the principal's interests in carrying through the particular transaction or lease involved; and that, therefore, the exception to the rule, that the knowledge of an agent is not to be attributed to his principal when the agent acts against the principal's interest, did not apply.

Aside from the different conceptions of what the evidence really was in the case, the judgment of the majority court is correct on the principle that the lessor, or plaintiff, established its case without resorting to any illegal contract or transaction.

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## BROWN et al. v. JACOBS PHARMACY CO.

(115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 126, 1902.)

### Conspiracy; Retailers' Association; Injunction.

A state retailers' association had an arrangement with a national retailers' association, two national wholesalers' associations and a manufacturing association, with reference to fixing and maintaining prices of drugs. The main features of the scheme under consideration in this case were these: Whenever a retail druggist sold below the association prices the state dealers' association would, by circulars and other ways, notify the wholesalers and manufacturers throughout the country, requesting them not to sell drugs to such dealer. When one of their salesmen visited towns within the jurisdiction of the dealers' association, he was required to sign an agreement that he would not sell drugs to the dealer who had been cutting prices. It was also necessary for the salesmen to obtain from the association a card showing that such an agreement had been signed. If a manufacturer or wholesaler refused to submit to these requirements the members of the local dealers' association withdrew their custom from him. Thus the arrangement not only enabled the state dealers' association to withdraw its support from the local dealer, but, through the other organizations, had the effect of driving off and preventing others from dealing with him, so that it would ruin his business by destroying his power to purchase goods unless he should submit to the association's regulations and its schedule of prices. A dealer within the jurisdiction of the state dealers' association began cutting prices and persisted in doing so. This fact was made known by the dealers' association to the wholesalers and manufacturers throughout the country, and

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in connection with the method of preventing such dealer from dealing with such manufacturers and wholesalers, it (the dealer being a corporation) was unable to prosecute its business. Thereupon the dealer sought to enjoin, on general principle and under the anti-trust act of 1896, the members of the state local association from interfering with its business. It was held that:

(1) Retailers are guilty of a conspiracy when, in a combination of themselves, wholesalers and manufacturers, they fix and maintain prices and use such combination to prevent its members from dealing with dealers in the same class of goods who refuse or fail to maintain such prices;

(2) A combination is against restraint of trade, if it has a tendency to restrain trade generally or monopolize it; (41 S. E. 555)

(3) A civil action for damages against conspirators will lie when, in carrying out their design or conspiracy, overt acts are done, causing legal damage; (p. 555)

(4) An injunction is a proper remedy whenever an injury threatens irreparable damage, or the injury is a continuing one, and would involve a multiplicity of suits at law. The threatened injury to a business is irreparable and may be restrained; (p. 563) and

(5) Inasmuch as the anti-trust act of Georgia exempts from its operation "agricultural products or live stock while in the possession of the producer or raiser" it is against the fourteenth amendment of the constitution of the United States, which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws." (p. 563½)

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## BURROWS v. INTERBOROUGH METROPOLITAN CO., et al.

(156 Fed. 389, U. S. C. C., N. Y. 1907.)

### Corporate Stock Ownership.

In 1902 the Metropolitan Street Railway Company, owning and controlling a large number of street surface railways in the boroughs of Manhattan and the Bronx, leased all of its railroads to the New York City Railway Company. Afterwards the Metropolitan Securities Company was organized and became the owner of all the stock of said city railway company. In January, 1903, the Interborough Rapid Transit Company, engaged in operating the underground railway, or "subway," in said city of New York, leased from the Manhattan Railway Company, all of its elevated railways in the city of New York, and assumed their operation. In February, 1906, a certain stockholders' syndicate, represented by August Belmont, controlling the management of the Interborough Rapid Transit Company, and a like syndicate owning a majority of the stock in the Metropolitan Street Railway Company and the Metropolitan Securities Company, caused the organization of the Interborough Metropolitan Company. Thereafter by various agreements and transfers between said stockholders' syndicates, the Interborough Metropolitan Company became the owner of about ninety-six per cent of the stock of the Interborough Rapid Transit Company; of about eighty-one per cent of the stock of the Metropolitan Street Railway Company, and of about ninety-six per cent of the stock of the Metropolitan Securities Company. These acquisitions and transfers were claimed to have the effect of destroying competition and creating a monopoly in the business of the transportation of

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passengers in the city of New York. Burrows, a citizen of Illinois, being a stockholder in the Metropolitan Securities Company, thereupon brought an action to declare said transfers of stock illegal and void under section 7 of Stock Corporations Law against monopolies. To this bill a number of demurrers were interposed, the principal ground for demurring being that the bill stated no cause of action. In overruling these demurrers, it was held that:

(1) A monopoly exists within the meaning of section 7, Stock Corporations Law, when every surface street, elevated, and subway railroad, in a locality are combined into one management and control, through corporate stock ownership; (p 392)

(2) Under section 40, Stock Corporations Law (Laws 1892, p. 1834, c. 688), and section 7 of the Stock Corporations Law (Laws 1897, p. 313, c. 384), corporations are authorized to purchase, acquire, and hold the stock of other corporations, provided they do not thereby combine for the creation of a monopoly or the unlawful restraint of trade, or for the prevention of competition in any necessary of life; (p. 394)

(3) Whenever a person or persons have, in fact, obtained substantially complete control of a particular business or article of trade, they are said to have a monopoly, although they have no legal power to prevent others from competing or attempting to compete with them; (p. 392)

(4) "If a statute contains two or more sections which at first view are apparently inconsistent or contradictory, they are to be harmonized and upheld if possible, and especially must this rule be followed when the alleged inconsistency is between two amendments of an act introduced and adopted at the same time;" (p. 394)

(5) Whether or not a monopoly is created is a question of fact under the particular circumstances of each case; (p. 396)

(6) Where a complainant unites his claims with those of

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some of the defendants, his bill is not multifarious when he does not base it upon the latter claims; (p. 397)

(7) An allegation by a stockholder in a bill against a corporation, showing what efforts have been made by him to secure action by its officers, is not necessary where the bill contains facts negativing collusion in bringing the proceeding, and it further appears that any application to the officers of the company to bring suit would have been futile; (p. 397)

(8) The maxim,—he who comes into equity must come with clean hands,—is inapplicable to a complainant unless the transaction tainting the complainant is before the court; (p. 397) and

(9) A ten months' delay in bringing an action by a stockholder to dissolve an illegal combination between corporations does not amount to laches when, in the meantime, application is made to the attorney-general for him to bring such proceeding and he refuses to do so. (pp. 397, 398)

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## CAMERON v. HAVEMEYER et al.
## HAVEMEYER et al. v. BROOKLYN SUGAR REFINERY et al.

(12 N. Y. Supp. 26, 1890.)

### Trust Certificate Holders; Receiver.

The trust agreement under which the "Sugar Trust" was formed having been declared illegal, the trustees under that agreement applied to the courts for a sale of the property in their hands, the ascertainment of the persons interested in said trust and the adjustment of claims, and a determination of the trustees' duties. While this action was pending, a trust certificate holder (Cameron) sought to enjoin said trustees from further management of the properties in their possession and for appointment of a receiver. In the latter suit, a preliminary injunction was granted. Both cases came on for hearing on motions to appoint receiver and continue injunction. It was held that:

(1) The winding up of a trust which had been declared illegal may either be done by unanimous consent of trust certificate holders, or by appointment of a receiver, the same as in cases of partnership;

(2) Where a trust agreement is declared void, each trust certificate holder has a right to demand that the affairs of the trust shall be wound up and that he have his share of the joint property;

(3) Where a trust agreement is declared void, the trustees having come into possession of property while acting thereunder, hold the same as custodians or trustees, not under the original agreement, but under a trust raised by operation of law; and

(4) A requirement in a trust agreement that in order to be valid a transfer of trust certificates must be made on the books of the trustees falls with the annulment of the trust agreement.

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## CAMORS-McCONNELL CO. v. McCONNELL.

(140 Fed. 412, aff'd 140 Fed. 987, U. S. C. C. and C. C. A., Ala. 1905–06.)

**Contracts; Vendor's Covenant; Trade Restraint; Defenses; Injunction.**

On December 8, 1899, a contract was entered into between certain parties, H. L. McConnell being one of them, whereby the property, effects, business and goodwill of Camors, McConnell & Company, a copartnership, were to be transferred to the Camors-McConnell Company in contemplation of its formation and of the adoption of such contract by said corporation when organized. As part of this contract there was a stipulation that neither of the sellers would "either individually or by or through a corporation, jointly or severally, directly or indirectly, engage in the growing or importing or selling of tropical fruits, or any other business, directly or indirectly, in competition with the new corporation" On the 27th of January, 1900, all the property, etc., acquired under the contract of December 8, 1899, was transferred to the Camors-McConnell Company, said company performing all of the obligations thereby assumed. A breach of the contract of December 8, 1899, being threatened by H. L. McConnell, a bill was filed for an injunction. On a motion for a preliminary injunction McConnell contended that the real purpose of the transaction in question was to suppress existing competition between the business conducted by the copartnership of Camors, McConnell & Company and the United Fruit Company, and to combine said business with corporations and companies confederated together to monopolize and control the business of buying, importing and selling fruit throughout the United States, and that the contract sought to be enforced was therefore illegal and void; that the contract involved was made for the purpose of aiding and facilitating the United Fruit Company and the Camors-McConnell Com-

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pany and other companies in combination with them in conducting their business in violation of the laws of the United States, and that said contract was made in restraint of trade and commerce among the several states and with foreign nations and for the purpose of forming and maintaining a combination in the form of a trust, and for that reason it was claimed to be illegal and unenforcible; and that the complainant had also entered into a combination with various other importers of fruit for the purpose of acquiring a monopoly in the importation and sale of same, and that the contract in question was to aid and facilitate that purpose, and that the court should for that reason refuse to enforce such contract by invoking the maxim that he who comes into a court of equity must do so with clean hands. No one but H. L. McConnell was a party to this proceeding. In granting a preliminary injunction it was held that:

(1) An agreement entered into between a buyer and seller of a going concern, in which is included the goodwill of the business, as ancillary and incident to such sale, that the seller shall not compete with the buyer in any way, although in partial restraint of trade, is not invalid;

(2) A party will not be permitted to repudiate his contract obligations merely because the other party to the contract is a member of an association or combination of corporations constituting a monopoly, or because its general business is in restraint of trade, when such contract does not directly grow out of such combination and is not in any way connected therewith; and

(3) Whenever a party, as part of a sale of his business, agrees not to engage in the same during a fixed period at a certain locality, and then threatens to break such an agreement, an injunction proceeding is a proper remedy to stop him.

NOTE.

On final hearing, the decree granting a perpetual injunction was reversed. (McConnell v. Camors-McConnell Co., 152 Fed. 321, 1907.)

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## CARROLL v. GREENWICH INSURANCE CO. et al.

(26 Sup. Ct. 66, 199 U. S. 401, 50 L. ed. 246, Ia. 1905.)

### Construction.

A state law prohibited two or more fire insurance companies by themselves, officers or agents, to make or enter into any combination or agreement relating to fire insurance rates, the amounts of agents' commissions, or the manner of transacting fire insurance. Under this law the state auditor was given the power to summon, examine suspects, and revoke licenses or permits to do business. A number of foreign fire insurance companies lawfully doing business in the state sought to enjoin the state auditor from taking action against them under this law, claiming that such law was repugnant to the state as well as Federal constitutions. A demurrer to their bill having been overruled, a perpetual injunction was granted. This decree was reversed, the United States supreme court holding that:

(1) Where in an enactment general and special language is used, the general language must be restricted by the specific provisions to the particular end sought to be accomplished;

(2) Section 1754, Code 1897, prohibiting fire insurance companies from entering into a combination relating to rates is constitutional when limited to the particular end sought to be accomplished;

(3) The fourteenth amendment to the Federal constitution does not prohibit states from limiting, in some cases, the freedom of contract; and

(4) A foreign corporation lawfully doing business within a state is no more bound by a general unconstitutional enactment than a citizen of such state.



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## CARTER-CRUME CO. v. PEURRUNG.

(86 Fed. 439, U. S. C. C. A., Ohio 1898.)

### Trade Restraint; Waiver of Illegality.

This was an action to recover an instalment due under a contract between two firms, whereby one of these firms secured certain contract rights and agreed to pay to the other firm a sum of money in designated instalments during a fixed period. The defense interposed was that this contract was entered into to enable the obligor firm to suppress competition and raise prices of a certain commodity. On the face, the contract appeared to be legal. Its illegality was in no way alleged in the pleadings. This illegality was attempted to be set up for the first time on writ of error. It was held that:

(1) Failure to plead properly that a contract is void for the reason that it is against public policy does not waive such defense. But, unless such illegality of a contract appears on its face or is admitted by both parties to it, it cannot be urged for the first time in an appellate court;

(2) An objection to the jurisdiction of a Federal court that a suit is not brought in the district of either plaintiff or defendant's residence must be made before pleading to the merits;

(3) A court will not disturb a verdict of a jury where there is any substantial evidence upon which the verdict could reasonably be based; and

(4) An independent producer may contract to sell his entire product or lease his plant, when such contract is entered into without concert with others or knowledge of or purpose to participate in the plans of the buyer.

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## CASE OF THE MONOPOLIES.

(11 Coke 84, Eng. 1602.)

### Monopolies.

Queen Elizabeth granted to Ralph Bowes and Edward Darcy two exclusive patents, one for twelve years and the other for twenty-one years, to import, manufacture and sell within the realm playing cards, the second grant to begin from the expiration of the first. Allein, a haberdasher, having infringed upon these patents, Darcy brought an action on the case against him for damages. The defendant pleaded specially a custom of London. To this plea there was a demurrer. The custom was held to be unavailable, because it was the same as the common law. The patents were declared void for these reasons:

(1) A monopoly is against the common law;

(2) Monopolies were interdicted by the civil law;

(3) The grants were a dangerous innovation;

(4) The grants were against acts of parliament for the advancement of freedom of trade and traffic.

NOTE.

The inseparable incidents to monopoly were enumerated to be: (a) The raising of prices, "for he who has the sole selling of any commodity, may and will make the price as he pleases;" (b) The quality of a commodity on which there exists a monopoly is not so good and merchantable as it was before the creation of the monopoly; (c) One having the sole trade in any commodity regards only his private benefit and not the public; (d) A monopoly tends to impoverish divers artificers and others, who, before, by the labor of their hands in their art or trade, have maintained themselves and their families; and (e) The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other individuals, for the end of all monopolies is private gain.

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## CENTRAL COAL & COKE CO. et al. v. HARTMAN.

(49 C. C. A. 244, 111 Fed. 96, U. S. C. C. A., Mo. 1901.)

### Damages; Anticipated Profits; Practice.

H brought an action against the Coal Company for treble damages, under section 7 of the Sherman Act. His complaint substantially alleged that since 1893 he had been engaged in the sale of coal in Kansas City, Kansas; that in 1896 he and defendants had formed a coal club to establish and control the prices at which coal should be sold in Kansas City, Kas., and Kansas City, Mo., and to restrain commerce among the states; that they had accomplished their purpose; that in 1897 he withdrew from the club; that thereafter the defendants and their associates would not sell him Salt Fork or Cherokee coal at any other prices than those which they had established for the sale of coal at retail to consumers; that this action of the defendants caused him a loss of all his trade in Salt Fork coal, and of a large portion of his business in Cherokee coal, and made it impossible for him to make contracts for the future delivery of coal, because he was uncertain whether or not he could obtain it; so that he suffered damages in the sum of $2,500. There was a general denial by the defendants. The trial resulted in a judgment against defendants for $390 damages, $500 attorney's fees and costs. This judgment was reversed for insufficiency of evidence, the court holding that:

(1) As a general rule, expected profits of a commercial business are too remote, speculative, and uncertain to warrant recovery for their loss but where the loss of profits from the destruction or interruption of an established business is made reasonably certain by competent proof of actual facts which present data for a rational estimate of their

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amount, such profits may be recovered; 111 Fed. 98, *et seq.*)

(2) One who seeks recovery for the loss of anticipated profits of an established business must prove the expenses and income of the business for a reasonable length of time before as well as during its interruption; (p. 99) and

(3) A verdict is unsustainable when founded on conjectures of an interested witness, unsupported by the proof, or the knowledge of any facts from which a party's loss, or its amount, could lawfully or rationally be inferred. (pp. 102, 103)

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## CENTRAL OHIO SALT CO. v. GUTHRIE.

(35 Ohio St. 666, 1880.)

**Restraint of Trade; Public Policy; Contracts.**

In 1871 all but one or two of the salt manufacturers in a large salt producing territory entered into a written contract whereby, for a period of five years, they jointly and severally agreed to associate themselves under the name of the Central Ohio Salt Company; to elect directors who were to regulate the price and grades of salt and settle all disputes and questions regarding the same; to place under the control of these directors all salt made or owned by each as soon as packed in barrels; to sell only at retail, and then only to actual consumers at the place of manufacture, at such prices as should be fixed by the directors from time to time; and to forfeit $2,000 in case of breach of said contract. G was one of the parties to this agreement, and for some time complied with its terms. Afterwards he refused to deliver to the company salt manufactured by him, and an action was brought by the company or association to recover possession of a certain amount of salt and to enforce performance of said agreement. The defendant answered, denying the plaintiffs' right to possession of said salt. By cross-petition the defendant claimed that the contract in question was illegal, and asked for an injunction restraining the plaintiffs from interfering with the possession of his property. A decree having been entered in favor of the cross-petitioner, the plaintiffs appealed. In affirming the lower courts, it was held that:

(1) An arrangement or contract between nearly all of the manufacturers of, and dealers in, a commodity whereby its production is controlled, its price is established and main-

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tained, and competition is destroyed, is in restraint of trade and void as against public policy.

(2) "Contracts in general restraint of trade are against public policy, and, therefore, absolutely void."

(3) When the clear tendency of an agreement or arrangement is to establish a monopoly and to destroy competition in trade, although no competition is in fact destroyed and the prices of the commodity involved are not raised, the agreement or arrangement is void as against public policy because the inevitable tendency of such contract is injurious to the public.

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## CENTRAL RAILROAD CO. et al. v. COLLINS et al.

(40 Ga. 582, 1869.)

**Corporations; Corporate Stock Ownership; Charters, Construction; Stockholders' Rights; Equity; Practice.**

Several stockholders in the Southwestern Railroad Company, Central Railroad & Banking Company, and the Atlantic and Gulf Railroad Company, brought an action, in behalf of themselves and such other persons as would come in, to enjoin the purchase and consummation by the Southwestern Railroad Company and the Central Railroad & Banking Company of twelve thousand three hundred and eighty-three shares of stock in the Atlantic and Gulf Railroad Company. The Southwestern Railroad Company and the Central Railroad & Banking Company were competing railroads of the Atlantic and Gulf Railroad Company, and it was claimed that the proposed purchase was for the purpose of managing the Atlantic and Gulf Railroad Company in the interest and for the benefit of the Southwestern Railroad Company and the Central Railroad & Banking Company; that the transaction constituted a perversion of the purpose of the legislature in organizing these three railroad corporations, a misuser of their franchises, and a violation of their charters; that it was against public policy and that it would therefore be injurious to the interests of said stockholders. The bill sought discovery by answers to interrogatories. The defendants answered. On motion of the state it was made a party complainant. Injunctions were thereupon issued, as prayed. The defendants then moved for dissolution of the injunction for want of equity. This motion was overruled, the court entering a decree in favor of complainants. In affirming this decree it was held that:

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(1) Acquisition or purchase of capital stock by a railroad company in a competing railroad company, with intent to hold it and to use the power thus acquired to secure an interest in the management, whether for good or evil, is against public policy; (p. 628)

(2) Corporate monopoly is against public policy; (p. 629)

(3) A right to lease does not give a right to become permanently interested in a corporation by the purchase of its stock; (p. 632)

(4) A corporation is the mere creature of the act of incorporation, and exists only for the purpose declared in its charter, having no other powers except such as are expressly granted and such as are necessary to effect the ends and objects of its existence; (p. 625)

(5) A corporation is limited in the enterprises which it may undertake and the property which it may possess and the contracts which it may make, to such as come fairly within the scope and purposes of the charter; (p. 623)

(6) Corporation charters, being private acts or contracts between the public and individuals, are to be construed strictly in their grants of power, and nothing is to be implied in favor of the company; (pp. 619, 625)

(7) Every charter of a private corporation is a contract, first between the state and the corporation—to which each is solemnly bound—the state that it will not impair the obligation—the corporation that it will perform the objects of its incorporation and keep within the powers granted to it, second, between the stockholders themselves, binding all of them to consent to the management of the affairs of the corporation by the majority who agree that they will apply the funds of the company solely to the objects and purposes of the charter; (p. 624)

(8) Stockholders have a right to insist upon the application of corporate funds and credit to charter purposes only and that these should not be used to the detriment of the public interest and in violation of the plain policy of the state, to protect themselves against the danger of forfeiture by uses contrary to that policy; (pp. 629, 631, 632)

(9) Each stockholder has rights in the nature of contract

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rights in the limitations of, as well as in the grants to, the corporation—and even the legislative will cannot, under the constitution of the United States, impair those contract rights by making him, against his will, an adventurer in an enterprise not contemplated by the original charter; (p. 632)

(10) Whenever a majority of stockholders in a corporation attempt to go beyond the legitimate scope of their corporation's charter by using the funds or pledging the credit of the company, it is a violation of the contract which the stockholders have made with each other, and entitles a minority stockholder to prevent such breach; (pp. 617, 631, 643)

(11) Whenever a corporation undertakes new and distinct enterprises not declared in the charter, under a pretense that they are in furtherance of the declared design, courts will restrain them; (p. 627) and

(12) A motion in the nature of a general demurrer, to be good, must show lack of proper parties to the bill. (p. 616)

NOTE.

At the time the opinions in the foregoing case were rendered, the supreme court of Georgia consisted of three justices, who wrote separate opinions. The principal opinion is by McCay, J. Chief Justice Brown wrote a concurring opinion. The dissenting opinion by Warner, J., makes two points: (a) It admits that stockholders have a right to sue in a court of equity for an alleged violation of their company's charter, but denies that they have a right to sue as citizens in behalf of the public. In this case, the state was a stockholder, and as such, stood in a double capacity. If it had a right as stockholder to bring the action, that should have been sufficient. This distinction is immaterial. Besides, McCay, J., concedes this very point when he says (p. 616): "The citizens, in their character as such, are not proper parties to this proceeding. The state as one of the stockholders of the Atlantic and Gulf road is a proper party. . . . This is a simple attempt to enjoin the making of a certain contract, a mere private suit, in which no one has a right to be

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heard, that is not interested in the decree." (b) The dissenting opinion then argues that the Central Railroad & Banking Company had the legal capacity to purchase the stock by virtue of its amended charter giving it the power "to purchase goods, chattels, and effects, of whatsoever kind, nature or quality the same may be;" that an act of 1852 authorized said railroad company to lease certain named railroads; that an act of December 11, 1861, empowered said railroad to connect its road with the Atlantic and Gulf Railroad; and that the purchase of the stock in question was not of a majority of the same and would therefore not enable the Central Railroad & Banking Company to control the Atlantic and Gulf Railroad Company. It is only by the most liberal construction of the acts of 1852 and 1861 that Warner, J., arrives at these conclusions He loses sight of the very important point made by the majority of the justices that if the Central Railroad & Banking Company had the power to purchase a single share of stock in another competing railroad it would also have the power to purchase a majority of all of the shares of such railroad. It will thus be seen that in the first instance Warner, J., is too technical, while in the other he is too liberal. The majority opinion rests upon more solid ground.

For an ingenious attempt to gain control of another Georgia railroad corporation, see 50 Fed. 338.

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## CENTRAL SHADE ROLLER CO. v. CUSHMAN.

(143 Mass. 353, 9 N. E. 629, 1887.)

**Patents; Patented Articles; Regulation of Prices; Corporation.**

For the purpose of using several patents to the best advantage, three owners of different patents in a single article formed a corporation. An agreement was then entered into between the corporation and the three patent owners or manufacturers, whereby each owner gave the exclusive license to the corporation to sell the article made under each patent for three years, the corporation agreeing to buy at a specified price each manufacturer's entire output. It was also agreed that all sales should be made in the name of the corporation; that should either party establish an agency in any city for the sale of such article, no other party should take orders for the same in that place; that the prices for said article of the same grade made by the different parties should be the same, according to a schedule contained in the contract, subject to changes which might be made by the corporation upon recommendation of three-fourths of the stockholders; and that during the life of the contract the patent owners should not dispose of their patents except upon such terms that the transferee should be bound by the agreement and that they should not dispose of their stock in the corporation without the written assent of a majority of the stockholders. The owner of one of said patents having violated this agreement, the corporation in question brought an action against him for an accounting and injunction to restrain a further breach. There was a demurrer to this bill for want of equity. In overruling said demurrer, it was held that:

(1) An agreement between owners of patents to form a corporation for the purpose of preventing or regulating

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competition merely in the sale of the patented article, when the contract does not limit the production nor restrict the sale of the commodity, but only regulates its price, and the commodity is not a prime necessity, is not invalid as against public policy; and

(2) A corporation formed by several owners of patents for the sale of the article manufactured by them under their patents at uniform prices is organized for a lawful purpose.

NOTE.

The decision in the foregoing case was based expressly on the special ground that the owner of a patent may do with it and the article manufactured under it, whatever he pleases, directly or indirectly through a corporation or other channel; and on the further ground that no injury to the public did result nor could have resulted from the arrangement in question. The question as to whether a similar arrangement extending beyond the life of the patent would have been upheld, was not involved.

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## CHAPIN et al. v. BROWN et al.

(83 Ia. 156, 48 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297, 1891.)

**Restraint of Trade; Contracts Not to Compete; Consideration.**

All the grocers of a certain town entered into an agreement in favor of third persons and without receiving any money or other consideration, to quit the business of buying and selling butter for two years, and such third persons agreed to carry on that business exclusively for the same period of time. In pursuance of this contract, the persons in whose favor the agreement was made, located and established their business at the town specified. Some of the grocers afterwards broke their contract. An action was thereupon brought for an injunction and damages. Judgment having been entered in favor of the defendants, the plaintiffs appealed. In affirming the lower court, it was held that:

(1) A promise on behalf of all of the merchants in a certain locality not to pursue a certain branch of their business, in order to enable another person to engage in the same exclusively, is without consideration;

(2) Contracts which destroy competition and tend to monopolize business in a certain locality are against public policy; and

(3) An agreement by all the dealers in a commodity in a certain locality to quit the business so as to enable another to become the only dealer in that line in such locality, tends to destroy competition and is against policy.

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## CHARLESTON NATURAL GAS CO. v. KANAWHA NATURAL GAS, LIGHT AND FUEL CO. et al.

(58 W. Va. 22, 50 S. E. 876, 112 Am. St. Rep. 936, 6 A. & E. Ann. Cas. 154, 1905.)

**Restraint of Trade, Contracts; Quasi-Public Corporations.**

Prior to January, 1903, the Charleston Natural Gas Co., a corporation, produced gas in Boone County for consumption in Charleston. It also leased territory in Roane County, and was about to run pipes from there to Charleston to aid its supply from Boone County. The Kanawha Natural Gas, Light, & Fuel Co., also a corporation, produced gas partly in Boone and partly in Kanawha County, had laid pipes to Charleston, and was about to lay pipes in its streets to furnish gas for public use. About January 20, 1903, the two corporations entered into a contract whereby the city of Charleston was divided into two sections, the Charleston Co. being given the exclusive right to sell its gas in one section and the Kanawha Co. being given a like privilege in the other section of said city. This agreement further provided that neither party would permit any person or corporation to operate or sell gas under its ordinances in the territory of the other; that neither of the companies would invade the other's territory in the manufacture or sale of gas; that gas should be sold or supplied to consumers at certain prices; that the Charleston Co. would take gas exclusively from the Kanawha Co.; that the Kanawha Co. was to bring gas for the joint use of both companies; that the earnings should be divided in certain proportions between the two corporations; and that the agreement should continue for twenty years. The United States Gas. Co. then came into the field. This company operated in the city of Huntington and procured its supply of gas

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from Roane and Kanawha counties. To this company, in consideration of its stock, the Kanawha Co. was about to transfer and assign all of its assets, leases, and wells. Whereupon the Charleston Co., instituted proceedings alleging that the Kanawha Co. proposed to surrender its charter and discontinue business after its property and assets were transferred as aforesaid; and that said transaction would result in irreparable damage to the Charleston Co. by leaving it without a supply of gas for its business, in violation of the duty and obligation of the Kanawha Co. under said contract. The prayer was for an injunction enjoining the consummation of said transfers and for specific performance of said agreement. A preliminary injunction was granted, but was later dissolved. In affirming the lower court, it was held that:

(1) A contract between competing *quasi*-public corporations, for controlling prices, limiting production, and suppressing competition in a useful article to the public, is against public policy and void; (58 W. Va. 26, 27)

(2) While generally, those public rules, which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, yet, in the instance of a business that presumably cannot be restrained to any extent whatever, without prejudice to the public interest, courts decline to enforce or sustain contracts embodying any restraint, however partial, because in contravention of public policy; (p. 25)

(3) Whenever the tendency or natural result of an arrangement or contract is to stifle competition, to the public's prejudice, the contract or arrangement is unlawful, whether destruction of competition is or is not actually intended; (p. 29)

(4) Void provisions in an entire contract destroy the whole contract; (p. 29)

(5) "Corporations cannot form a partnership;" (p. 29) and

(6) It is the court's duty to condemn monopoly. (p. 25)

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## CHATTANOOGA FOUNDRY & PIPE WORKS et al. v. ATLANTA.

(27 Sup. Ct. Rep. 65, 203 U. S. 390, 51 L. ed. 241 Tenn. 1906.)

### Damages; Limitations.

Two Tennessee members of the trust or combination held unlawful in the Addyston Case were sued by the city of Atlanta to recover threefold damages for an alleged injury to the city in its business or property, under sec. 7 of the Sherman Act. The alleged injury consisted in this: The city of Atlanta, being engaged in conducting a system of waterworks and wishing to buy iron waterpipe, was led, by reason of the illegal arrangements between the members of the trust, to purchase the pipe from the Anniston Pipe & Foundry Company at a price much above what was reasonable or the pipe was worth. The purchase was made after a simulated competition at a price fixed by the trust, and embracing a bonus to be divided among the members. The defendants demurred to the declaration and pleaded not guilty and that the action accrued either more than one year or more than three years before the suit was brought, relying upon sections 2772 and 2773 of Tennessee Code. Upon overruling the demurrer a trial was had, resulting in a verdict in plaintiff's favor for the difference between the price paid and the market or fair price that the city would have had to pay under natural conditions had the combination been out of the way, together with an attorney's fee. A judgment trebling the damages followed. This was affirmed by the circuit court of appeals. In affirming said judgment in the supreme court it was held that:

(1) Sec. 2776 (Shannon, sec. 4473), after enumerating certain actions and providing "and all other cases not ex-



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pressly provided for, within ten years after the cause of action accrued," is applicable to an action for damages brought in Tennessee under sec. 7 of the Sherman Act;

(2) Limitation of actions under sec. 7 of the Sherman Act is left to local laws by silence of the statute;

(3) Five years' limitation in Rev. Stat., sec. 1047, U. S. Comp. Stat. 1901, p. 727, of any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," is inapplicable to actions brought under sec. 7 of the Sherman Act;

(4) A purchaser of goods paying a larger amount for them than the market or fair price that they would cost under natural conditions had there existed no illegal combination may recover the excess, together with attorney's fee and treble damages, under sec. 7 of the Sherman Act;

(5) An injury to a person's property may consist in its diminution; and

(6) A city is a "person" within the meaning of secs. 7 and 8 of the Sherman Act.

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## CHESAPEAKE & OHIO FUEL CO. v. UNITED STATES.

(115 Fed. 610, U. S. C. C. A., Ohio, 1902.)

**Trade Restraint; Interstate Commerce.**

Three individuals, three partnerships and eight corporations, engaged in coal mining and manufacturing of coke and shipping of coal and coke, as the Chesapeake & Ohio Coal Association, contracted with Chesapeake & Ohio Fuel Company, a West Virginia corporation, for the exclusive sale of the entire output of the several mines and manufactories on the Chesapeake & Ohio Railway and its branches to the Fuel Company for west shipment for the period of five years. An executive committee of the coal association was to fix prices from time to time at which the members were to sell their coal and coke to the Fuel Company. This company bound itself to deal only with the members of the coal association under its direction and control; to make monthly reports to the association's executive committee; to pay the prices fixed by said committee for coal and coke; to obtain as large a profit from the sale of these products as possible; and to turn over to the association the excess over a certain percentage of profit from said sales. On behalf of the United States a proceeding was instituted against said combination to declare it illegal and to restrain further action thereunder. A decree in complainant's favor followed. In affirming the lower court it was held that:

(1) Under the Sherman anti-trust act all contracts are illegal when in restraint of trade or commerce among the states, whether the restraint is reasonable or unreasonable;

(2) A combination's tendency to monopolize trade or com-

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merce is sufficient to bring the combination within the prohibition of the Sherman anti-trust act;

(3) The effect upon interstate commerce and not the intention of the parties entering into a combination determines whether or not it comes within the statute;

(4) A combination's effect must be determined, not only with reference to consumers of the articles sought to be controlled, but also as to the combination's effect upon others in the business; and

(5) Interstate commerce is affected, whenever an agreement or combination operates directly, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of commerce, by preventing or restricting the sale of such article.

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## CHICAGO BOARD OF TRADE v. CHRISTIE GRAIN & STOCK CO.
## L. A. KINSEY CO. v. CHICAGO BOARD OF TRADE.

(198 U. S. 236, 49 L. ed. 1031, Mo. and Ind. 1905.)

**Futures; Trade Restraint.**

In first of these cases, Christie Grain & Stock Company, and in the second case, L. A. Kinsey Company, in some way obtained possession for distribution continuous market quotations of prices on sales of grain and provisions for future delivery *gathered* by and the sole property of the Chicago Board of Trade, and by it distributed through a telegraphic company under contract. These quotations could only be made use of by regular members of said board of trade and under its rules and regulations; the contract between the board of trade and telegraphic company requiring the latter to submit to the former for approval all applications for quotations. To restrain this unauthorized use the board of trade brought suits in equity, one in the eighth circuit, the other in the seventh circuit. Various defenses were interposed. The main defense was that the Chicago Board of Trade was itself guilty of operating its board of trade in violation of statute. Another defense was that the contract between the board of trade and telegraphic company came within the Sherman anti-trust act. On appeal to the eighth circuit court of appeals of the Christie Case defendant's contention was sustained and bill was ordered dismissed. When the Kinsey Case reached the seventh circuit court of appeals the decree refusing relief was reversed and the lower court was ordered to grant the injunction. The supreme court reversed Christie Case and affirmed Kinsey Case, holding that:

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(1) Under present charter of Chicago Board of Trade dealing in futures by board of trade members as principals, not as brokers, is lawful;

(2) Advance information in form of quotation of prices, etc., is a trade secret entitled to protection of the courts regardless of whether the information concerns legal or illegal acts; and

(3) Neither the common law nor Federal statute prohibits the owner of property or of a valuable right from limiting its use himself or through others.

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## CHICAGO GAS LIGHT & COKE CO. v. PEOPLE'S GAS LIGHT & COKE CO.

(121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124, 1887.)

**Restraint of Trade; Quasi-Public Corporations; Corporations, Powers.**

The Chicago Gas Light & Coke Co. was organized in 1849, under a special legislative act, giving it ten years' exclusive privilege to manufacture and sell gas within the city of Chicago. In 1855 the People's Gas Light & Coke Co. was also organized by special charter for similar purposes, to cover the same territory, the legislature reserving the exclusive privilege of the Chicago Co. during its ten years' term of existence. Each company erected the necessary works for manufacturing and supplying of gas. In 1862 the Chicago Co., the People's Co., and a third party, an individual, entered into a contract to continue for a hundred years, whereby the Chicago Co. exchanged its mains and pipes in part of the city for the mains and pipes of the People's Co. in the other part of the city, each agreeing with the other for the exclusive right to supply gas in its portion of the city, and neither to interfere with the business of the other in its territory. In 1886 the Chicago Co. attempted to invade the People's Co's territory by obtaining permission from the City Council to lay gas mains to be connected with mains and service pipes in the streets of said People's Co.'s territory. Whereupon, the People's Co. brought an action to compel specific performance of said contract and to prevent its violation. The superior court granted a preliminary injunction, which it subsequently dissolved and dismissed the bill. This decree was reversed on appeal to the appellate court. On further appeal to the supreme court, it was held that.

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(1) Any private contract by which a *quasi*-public corporation is prevented from performing a public duty, as distinguished from a mere privilege or private right, is against public policy and void; (121 Ill. 540)

(2) Any restraint, however partial, on a business which, from its public character, cannot be restrained at all without prejudice to the public, is unlawful; (p. 545)

(3) The manufacture and sale of fuel and illuminating gas in municipalities, under legislative authority, is a business of a public character; (p. 539)

(4) Although, generally, a contract in partial restraint of trade is valid, yet whenever the restraint is unreasonable, oppressive and injurious to the public, such contract is against public policy; (p. 546)

(5) Corporations have only such powers as are conferred upon them by statute and such incidental powers as are necessary to carry into effect those specifically conferred; (p. 546) and

(6) A court of equity will aid neither of the parties in the enforcement of an unlawful contract. (p. 542)

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## CHICAGO, M. & ST. P. RY. CO. v. WABASH, ST. L. & P. RY. CO.

(61 Fed. 993, U. S. C. C. A., Mo. 1894.)

### Trade Restraint; Quasi-Public Corporations; Executory Contract

In 1883 seven railroad companies entered into a number of traffic contracts, the express object of which was to operate their railroads under one system. Each railroad company agreed to form and be a part of and assist the others in procuring and forwarding freight in any direction, to establish and maintain uniform rates, and not to compete with the others for traffic. A common fund of all the gross earnings from freight was created. This fund was to be pooled by each of the parties to these contracts in certain proportions. Twenty-five years was to be the life of the contracts. One of the parties to these contracts—the Wabash, St. Louis & Pacific Railway Company—was placed in the hands of receivers, who acquiesced in and carried out these contracts until abandoned by mutual consent. During the life of said contracts the Wabash, St. L. & P. Ry. Co. earned more than its proportionate share, and Chicago, M. & St. P. Ry. Co. earned less. The exact amount having been ascertained by the pool commissioner, the receivers were ordered to pay the same, but failed to do so. In a foreclosure proceeding against the Wabash, St. L. & P. Ry. Co., this claim was set up by Central Trust Co.'s petition. It was objected to because the contracts upon which the claim was based were against public policy. The court dismissed the petition. On appeal, the decree of dismissal was affirmed, the court holding that:

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(1) A contract performed on one side only is executory;

(2) Neither of the parties to an illegal executory contract can make it the foundation of an action; and

(3) Any contract disabling a *quasi*-public corporation from performing its public duties, or making it to the corporation's interest not to perform such duties, or removing all incentive to their performance, is contrary to public policy and void.

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## CHICAGO WALL PAPER MILLS v. GENERAL PAPER CO.

(39 Chi. Leg. N. 51, U. S. C. C. A., Ill. 1905.)

**Penal Laws; Extraterritorial Effect; Trust Defense.**

The General Paper Company was organized in 1900 under the laws of Wisconsin to act as exclusive sales agent for about twenty-one paper manufacturing corporations located in Wisconsin, Michigan, Illinois and other western states. Immediately after organization this company established a place of business in the city of Chicago, and complied with state foreign corporation laws. In 1905 said company sold and delivered a large quantity of wall-paper to the Chicago Wall Paper Mills, an Illinois corporation, and, not being able to obtain payment therefor, brought an action in assumpsit against said company for amount due. The defendant pleaded the general issue and seventeen special pleas, in which the manner and purpose of plaintiff's organization were set forth. It was further alleged that the plaintiff's board of directors consisted of representatives of the twenty-one paper manufacturing mills, so that for trade purposes they constituted a practial amalgamation; that by reason of the General Paper Company having become the exclusive sales agent of all such paper-mills, it had the exclusive power to determine the extent of the output, and to fix prices arbitrarily; that by such confederation competition between the twenty-one producing corporations was stifled, the plaintiff corporation, as such sales agent, being in control of ninety per cent. of the paper and paper products manufactured west of the Allegheny Mountains; and that the alleged combination was violative of 1891 Illinois anti-trust law.

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Demurrers were sustained to each of the seventeen pleas and judgment *nihil dicit* was rendered in plaintiff's favor. In affirming this judgment it was held that:

(1) The acts alleged in the pleas (if constituting an offense) were committed in Wisconsin, and not in Illinois;

(2) Section 6 of anti-trust law of 1891 is penal in its nature and has no extraterritorial effect;

(3) A state has no jurisdiction to provide any punishment for an act done outside of its territorial limits;

(4) Federal courts will follow and adopt the construction placed upon state laws by the highest court of the state;

(5) When a direct proceeding against an unlawful combination cannot avail, the defense made in a collateral proceeding that the plaintiff is such a combination must fail; and

(6) Contracts entered into with an alleged unlawful combination, but founded upon a good consideration, are collateral to the unlawful scheme or combination, and are not tainted thereby.

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## CHICAGO, WILMINGTON & VERMILION COAL CO v. PEOPLE.

(214 Ill. 421, 73 N. E. 770, 1905.)

Several of the largest coal producing companies formed a voluntary association for the purpose of avoiding competition, controlling and fixing uniform prices within a definite territory in Illinois. The character of this combination is summarized at page 448 as follows: "It appears that the association of which the plaintiffs in error were members was a voluntary association formed many years ago; that the plaintiffs in error, with one exception, were engaged in mining coal; that the association had an acting president and secretary; that in 1897 it assumed the name of 'The Northern Illinois Soft Coal Association;' that its expenses were paid out of assessments made upon its members; that subsequent to 1897 its meetings were held in the city of Chicago; that its meetings were called by its secretary; that a copy of the minutes of its proceedings at each meeting was sent to its several members; that the association held meetings on March 26, 1900, September 26, 1902, October 13, 1902, and December 13, 1902, at which the price at which the members of the association should sell coal in northern Illinois was discussed and fixed; that each of the plaintiffs in error was represented at one or more of the meetings held in 1902; that circulars showing the price at which coal was to be sold by the members of the association in numerous towns and cities of northern Illinois were prepared at the meetings held on September 26 and October 13 and sent to the members of the association, and by several of the members of the association sent to the trade in the territory in which the members of the association sold coal."

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This was held to be (page 441): "A combination between independent producers of coal to prevent competition in the sale of that article, which is a necessary of life, is an act inimical to trade and commerce and detrimental to the public and unlawful, and amounts to a common-law conspiracy, regardless of what may be done in furtherance of the conspiracy."

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## CILLEY v. UNITED SHOE MACH. CO.

(152 Fed. 726 U. S. C. C., Mass. 1907.)

### Pleading, Definiteness.

The amended declaration in this case, based upon sec. 7, Sherman Act, substantially alleged that the defendant, a corporation, contrary to the provisions of said act, attempted to monopolize a part of the trade or commerce in shoe machinery among the several states, and with foreign nations, by diverse means unknown to the plaintiff compelling or inducing all manufacturers of boots and shoes throughout the several states, and in foreign countries, to lease or otherwise acquire shoe machinery from the defendant alone, and to enter with the defendant into contracts and agreements whereby such manufacturers were bound to use no machinery except such as was furnished to them by the defendant; that said manufacturers constituted the sole market for the sale of the plaintiff's machines; that the plaintiff was a manufacturer of shoe machinery and was engaged in manufacturing and selling a machine for sole leveling and for sole laying, known as the "Universal Leveler;" that by reason of the said contracts, agreements, written leases, and other instruments, customers were prevented from buying or leasing the plaintiff's machines; that by these means the plaintiff had been deprived of the right of an open market and prevented from selling or leasing his property; and that thereby his business had been destroyed and his property rendered valueless. In sustaining a demurrer to the declaration as amended, it was held that.

(1) As a general rule, contracts with respect to patents are outside of the doctrine of restraint of trade, both at common law and under the Federal statute; (p. 728)

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(2) Under the Act of July 2, 1890, a declaration, complaint or petition must set forth the substance of the contract in restraint of trade, or the substantial facts constituting the attempt to monopolize; (pp. 728, 729)

(3) Pleading in the words of Act of July 2, 1890, is insufficient, as the statute does not set forth the elements of the offense prohibited; (p. 728)

(4) Where a statute does not set forth the elements of the offense forbidden, a declaration, complaint or petition, founded thereon must be sufficiently certain and definite to enable the court to determine whether the alleged offense is within the statute; (p. 728) and

(5) Averments in a declaration must be sufficiently certain and definite to enable the defendant properly to prepare his defense. (p. 728)

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## CINCINNATI, PORTSMOUTH, BIG SANDY & POMEROY PACKET CO. v. BAY.

(26 Sup. Ct. Rep. 208, 200 U. S. 179, 50 L. ed. 428, Ohio. 1906.)

**Vendor's Covenant; Jurisdiction; Federal Question.**

A number of steamships and boats were sold under a contract containing a stipulation binding the seller not to engage directly or indirectly in any freight and passenger packet business between certain points for a definite period, the vendee agreeing to maintain the same rates charged by the vendor. An instalment of the purchase price becoming due, the vendor sued the vendee for the same. The vendee resisted the action claiming the sale to be against trade restraint. A judgment in favor of the vendor followed. This judgment was affirmed by the state supreme court, and on a writ of error from the United States supreme court, in affirmance of this judgment, it was held that:

(1) A vendor's covenant to withdraw opposition, made as part of the sale of a business, is not within Sherman anti-trust law; (26 Sup. Ct. 210)

(2) The object of a contract will not be presumed to be unlawful unless a fair construction requires it upon established facts; (p. 209) and

(3) The United States supreme court has jurisdiction to review a case in which a Federal question is raised and necessarily decided by the highest state court. (p. 208½)



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## CLANCEY v. ONONDAGA FINE SALT MFG. CO.

(62 Barb. 395, N. Y. 1862.)

**Corporations, Organization; Illegal Contracts; Defenses; Evidence.**

In 1858, there were on Onondaga Salt Springs Reservation about 350 blocks owned by about 212 individuals, who were engaged in the manufacture of fine salt. In that year these manufacturers caused the organization of a corporation, the Onondaga Fine Salt Mfg. Co., to enable them, it was claimed, to limit and fix the amount of salt to be manufactured on said reservation, to fix and control the price thereof, and to prevent competition in the sale of salt. To carry out these purposes, each manufacturer was required to lease to said corporation the salt block or blocks owned by him and to enter into an agreement with such corporation by which he was to manufacture salt for it in the block or blocks so leased under certain restrictions contained therein, thereby giving to said corporation the control of the blocks and the salt manufactured in them. In the same year, Martin Mara & Co leased to said corporation a certain salt block for one year, and on the same day entered into an agrement with it to manufacture and deposit in bins all the salt required to be made by it during the salt-making season of that year, at a fixed price. Mara & Co. then proceeded to manufacture and deliver to said corporation salt in pursuance of said lease and agreement, receiving payment in part. A balance of $305.79 remaining due and unpaid to Mara & Co., its assignee brought an action against the Onondaga Fine Salt Mfg. Co. to recover the same. The defendant answered, claiming that the contract upon which the action was based was made in aid of an unlawful scheme

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or combination and was therefore illegal. On a reference, the referee found that the defendant was illegally organized, but that the plaintiff was not chargeable with the illegal purposes in question, and therefore reported that the plaintiff was entitled to recover. A judgment in accordance with said findings having been entered, the defendant appealed. In reversing this judgment and granting a new trial it was held that:

(1) Where the declared object of a corporation is a legal one, and the corporation is otherwise lawfully organized, the mere intention of the incorporators to carry into effect illegal purposes, or the subsequent abuse or perversion of the corporate powers, does not destroy the corporate entity of such corporation; (p. 403)

(2) Contracts and agreements entered into to secure an unlawful end are illegal; (p. 404)

(3) A contract made to aid the carrying out of an illegal purpose is utterly void, and cannot be enforced either by the party to it or any one deriving title through him; (p. 407)

(4) "While a party to an illegal contract cannot enforce it, it is competent for him to resist its enforcement by reason of its illegality;" (p. 407) and

(5) Those assailing agreements on the ground that they are in aid of an illegal combination must show that such agreements were entered into with the knowledge of the illegal object, as it is possible that a party may enter into contracts which may give effect to the illegal purpose, in ignorance of the unlawful design. (p. 404)

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## CLARK v. CYCLONE WOVEN-WIRE FENCE CO.

(54 S. W. 392, Tex. Civ. App. 1899.)

**Contracts; Patents.**

This was an action on a note in which the defenses were: (a) that the note was given in consideration of a licensee's contract containing a provision fixing the price at which a patented article shall be sold and limiting the territory within which such license shall be operative; and (b) that the patentee, when granting the license and as a part of such contract, voluntarily and fraudulently represented to be the patentee of another artcle. The licensee, having come into possession of certain property under the license agreement, tendered this property to the patentee and claimed damages for breach of contract. The jury decided in defendant's favor. In modifying the judgment on appeal, it was held that:

(1) A contract between a patentee and licensee regulating the price at which the patented article shall be sold and restricting its use within a limited territory is not within state anti-trust laws;

(2) Under the facts of the case there was a proper tender of the property to the plaintiff; and

(3) The defendant should have had judgment for the amount of damages sustained by reason of plaintiff's breach of the contract.

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## CLARKE v. CENTRAL RAILROAD & BANKING CO. OF GA. et al.
## CENTRAL TRUST CO. OF N. Y. v. COMER et al.

(50 Fed. 338, 15 L. R. A. 683, U. S. C. C., Ga. 1892.)

### Corporate Stock Ownership; Voting Trust.

For the purpose of obtaining control of a majority of the capital stock of the Central Railroad & Banking Co. of Georgia, certain persons, in 1887, bought about 40,000 shares of said company's stock. In furtherance of this purpose, these persons caused the organization of a North Carolina corporation under the name of "The Georgia Company," with the power "to purchase, acquire, and to hold, or guarantee, to endorse the bonds or stocks of any railroad company . . . to lease any railroad . . . to engage in the business of transportation, and to operate railroads . . ." and "to aid any railroad company in this or any adjoining states 'except building any railroad.'" The persons holding said 40,000 shares of stock then turned over their entire holdings to said Georgia Company with the agreement that said stock should be held in a block, with a view to permanently controlling the management of the Central Railroad and its properties. Afterwards, the Georgia Company deposited with the Central Trust Company of New York its entire holding of stock and had issued thereon and sold to the public 4,000,000 of its bonds. The Georgia Central, also, by virtue of its majority control, took charge, through a president and board of directors elected in the main by this block of stock, of the Central Railroad & Banking Co. of Georgia. Thereafter, the Georgia Company transferred all of its capital stock to the Richmond & West Point Terminal Railway & Warehouse Co. (hereinafter called the Ter-

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minal Co.) This company then came into control of the Central Railroad & Banking Co. The Terminal Co. also had control of the Richmond & Danville Railroad Co. and of the East Tennessee, Virginia & Georgia Railroad Co., both of which were competitive lines of the Central Railroad & Banking Co. Subsequently the Terminal Co. issued, through the Central Trust Co. of New York, a large number of its bonds, secured by mortgage deposited with the Central Trust Co. on its stock holdings, in all the properties under its control. Concerning the 40,000 shares of stock of the Central Railroad, it was stipulated in the mortgage that whenever the Terminal Co. presented a bond of the Georgia Co., the Central Trust Co. should issue in lieu thereof a bond of the Terminal Co. Two millions of the bonds of the Terminal Co. were left on deposit with the Central Trust Co., for the purpose of procuring, by the use of said bonds, 32,000 shares of stock of the Central Railroad, which had not yet been secured by the Terminal Co. or the promoters of the scheme to possess and control the Central Railroad & Banking Co. of Georgia. The Terminal Co. had obtained elsewhere 2,200 shares of stock, which it likewise deposited with the Central Trust Co. This stock was deposited under a stipulation by the promoters of the scheme that its voting power should be retained by the Georgia Co. until absorbed by the Terminal Co. By means of this voting power, the Terminal Co. obtained absolute control of the Central railroad. In 1891, the Terminal Co. leased, for ninety-nine years, the Central Railroad & Banking Co. of Georgia, and all of its property, nominally to the Georgia-Pacific Railroad Co., but really to the Richmond & Danville Co., both of which were under the control of the Terminal Co. This lease and the proceedings of those in charge of the control of the Central Railroad & Banking Co. were attacked by a bill in equity. A temporary receiver was appointed. While this officer was proceeding to

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take possession of the assets of the Central Railroad & Banking Co., the Georgia-Pacific and Richmond & Danville Companies threw up the lease, and formally abandoned the possession of all the properties. At the hearing of the rule to show cause why the injunction prayed for should not be granted, and a receiver appointed, the court granted an interlocutory order appointing receivers to take charge of the properties and assets of the Central Railroad & Banking Co., and all subsidiary railroads and steamship companies. The order directed an election, for a board of directors, to be held on a certain date, and it enjoined the Central Railroad & Banking Co. from receiving the vote of the forty-two thousand two hundred shares of stock controlled by the Terminal Co. and held by the Central Trust Co. of New York; provided, however, that in case there was a transfer of this stock in good faith, it might be voted, upon the court's approval of the genuineness and legality of the transfer. An application was subsequently made to have this order modified so that the stock could be voted by the Central Trust Co. and counted in the election. The motion was based upon certain representations. In denying the application it was held that:

(1) A mere custodian or naked trustee of capital stock has no power to vote such stock; (50 Fed. 343)

(2) The voting power of pledged stock is in the pledgor or mortgagor, even in the absence of an express stipulation to that effect, and where the pledgor or mortgagor is disqualified from voting the stock, the disqualification extends as well to the pledgee or trustee; (p. 343)

(3) Conflicting trusts or conflicting interests cannot be reposed in one trustee; (p. 344)

(4) A combination between individuals to control the majority of stock of a competing corporation, and an agree-

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ment not to transfer their shares to the opposition nor vote against the combination are in restraint of trade and against public policy; (p. 345)

(5) It is unlawful, under Georgia Const. 1877, art. 4, sec. 2, par. 4, for one corporation, domestic or foreign, to acquire the control of a competing domestic corporation through the purchase of its capital stock; (p. 346) and

(6) Such powers of a corporation as are against the state's policy cannot be exercised by a foreign corporation under the doctrine of comity. (p. 341)

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## CLELAND et al. v. ANDERSON et al.

(66 Neb. 252, 92 N. W. 306, aff'd 98 N. W. 1075, 1902–04.)

**Constitutional Law; Class Legislation; Bankruptcy; Parties.**

A retail and wholesale dealer and contractor in lumber sued the Nebraska Retail Lumber Dealers' Association, its secretary and three of its members to recover damages sustained by being driven out of business through an alleged unlawful combination and conspiracy. The association's object was to prevent its members from being subjected to competition of wholesalers. Its by-laws defined and classified retailers and imposed a penalty upon any wholesaler who sold directly to consumers or to others than regular dealers. Wholesalers were permitted to become honorary members of the association. The acts complained of consisted in sending circulars, letters and telegrams to the trade warning it not to deal with complainant. This had the effect of preventing complainant from making further purchases of goods necessary for his business and forcing him into bankruptcy, which formed the basis for the action. In the trial court complainant had judgment. On appeal the supreme court commissioners granted a new trial, and held that:

(1) A statutory provision referring only to combinations and conspiracies of persons engaged in the manufacture, sale and transportation of goods, wares and merchandise to prevent or hinder competition, and regulate and control prices, is a reasonable and constitutional classification, although out of caution organizations of laborers to raise or maintain wages are exempted from the operation of such provision; (92 N. W. 308)

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(2) Nebraska constitution does not require amendments to a bill, or a bill as amended, under legislative consideration, to be read at large before each house on three different occasions; (p. 309½)

(3) A right of action for damages sustained through an unlawful combination or conspiracy in restraint of trade is personal to the party injured and on his becoming bankrupt does not pass to the trustee in bankruptcy, regardless of whether or not an action for such damages is or is not pending at the time of becoming bankrupt; (98 N. W. 1075)

(4) An unincorporated non-trading association cannot sue or be sued under a common name, but a suit must be brought by or against the members of such an association; (92 N. W. 312½)

(5) "Wherever the writings or words of any of the parties charged with or implicated in a conspiracy can be considered in the nature of an act done in furtherance of the common design, it is admissible in evidence, not only as against the party himself, but as proof of an act from which, *inter alia*, the jury may infer the conspiracy itself;" (p. 311)

(6) Where acts of certain parties charged with conspiracy are admitted as proving a common design and other parties to the action are not connected with such conspiracy by proper evidence, if the case is tried before a jury, an instruction should be asked from the court directing the jury to consider the evidence only against those conspirators whose acts or declarations were proved; (p. 311)

(7) Where defendants are jointly and severally liable for a wrong, one of such defendants cannot take advantage of an error committed against or in favor of another of such defendants; (p. 313) and

(8) A dealers' association preventing its members from competing with each other and inducing wholesalers not to sell to consumers and to sell only to dealers of a certain class is within Nebraska anti-trust provisions. (p. 310)

NOTE.

Except as to point (3) the supreme court, in 98 N. W. 1075, approved the commissioners' opinion. On the two occasions

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the foregoing case was before the supreme court commissioners, a distinction was made between a pending action for damages at the time of bankruptcy and such an action subsequently commenced; holding that where an action for damages is pending it is governed by section 455, Code Civ. Proc., and passed to the trustee in bankruptcy. The supreme court, however, in 98 N. W. 1075, obliterates this distinction.

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## CLEMONS v. MEADOWS.

(94 S. W. 13, Ky. 1906.)

### Contracts; Discontinuing Competition.

M and C were owners of two of the best hotels in Fulton, Kentucky. In 1904 they entered into an agreement whereby M agreed to discontinue running his hotel for three years in consideration of monthly payments to be made by C. In an action by C on this contract the contract was declared void, the court holding that:

(1) A promise to discontinue competion with another in his business is in restraint of trade and against public policy when made, not as part consideration for the sale of promisor's business, but the promise is given in consideration of a sum paid, or to be paid by the promisee; and

(2) "A hotel is a *quasi*-public institution."

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## COE et al. v. LOUISVILLE & NASHVILLE RAILROAD CO.

(3 Fed. 775, U. S. C. C., Tenn. 1880.)

**Railroads, Duties, Contracts; Equity Jurisdiction; Injunction.**

For over twelve years C and M conducted a stock yard on a lot contiguous to a railroad and depot owned or operated by L. & N. R. Co. This yard, by permission or acquiescence of said railroad company, was connected with said company's railroad by stock gaps and pens. In March, 1880, N. C. & St. L. R. Co. and L. & N. R. Co., the latter having control of the former, contracted with the Union Stock Yard Company whereby the Stock Yard Company was to erect and maintain a stock yard in the city of Nashville on the line of N. C. & S. L. R. Co. and more than a mile from C and M's yard, the railroad companies agreeing that they would establish and make said stock yard the only delivering point in said city for live stock. C and M were thereupon notified that after a certain date they must ship their freight through the new stock yard. Being unable to induce said companies to change or abandon their project, C and M filed a bill in equity for an injunction, seeking to prohibit the doing of the threatened and alleged wrongful acts and to compel the defendant to continue the facilities and accommodations theretofore accorded them. In granting a mandatory injunction it was held that:

(1) When freight is of such a character that it can only be delivered to a railroad for transportation in bulk in large quantities, and to meet such necessity a shipper selects a location for the prosecution of his business contiguous to a railroad where he can have the benefit of side connections, a railroad

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company, after encouraging large investments in the establishment of a private depot and acquiescing in shipments made therefrom cannot compel such shipper to make use of another depot erected by a competitor under a contract between him and the railroad; (3 Fed. 778, *et seq.*)

(2) Common carriers owe a legal duty to transport and deliver freights offered them for that purpose, in accordance with the usual course of business and, whenever practicable, such delivery must be made to the consignee; (p. 778)

(3) Where adequate relief can be afforded only by enforcing specific performance of a legal duty and redress at law for a breach of such duty can only be obtained through a multiplicity of suits, equity has jurisdiction to compel specific performance of such duty; (p. 781) and

(4) Upon a preliminary application for an injunction, a mandatory order may issue whenever the urgency of the case demands it and the rights of the parties are free from reasonable doubt. (p. 781)

NOTE.

The foregoing decision may also be based on the principle that a *quasi*-public corporation cannot relieve itself of a legal duty to the public by private contract.

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## COHEN v. BERLIN & JONES ENVELOPE CO. et al.

(166 N. Y. 292, 59 N. E. 906, 1901.)

**Restraint of Trade, Contracts; Practice.**

The envelope business having become unsatisfactory in its results to nine envelope manufacturers who manufactured eighty-five per cent of all the envelopes in the United States, some of them, in 1887, entered upon a scheme to improve their business and to this end organized the Standard Envelope Company, whose stock was mostly issued to said manufacturers; and secured control of the later patents, as well as the makers of patented machinery for manufacturing envelopes. In order to obtain control of the other manufacturers who manufactured the fifteen per cent of the envelopes in the United States the nine manufacturers entered into separate contracts with a particular manufacturer whereby he agreed, for five years, to supply the trade with a certain quantity of envelopes at prices to be fixed by the Standard Envelope Company from time to time, to sell envelopes neither directly nor indirectly to any one below schedule prices during the term of the agreement; and to neither sell, pledge, transfer, lease or give possession of his manufacturing plant or machinery except on condition that the purchaser become a party to the agreement and not to become interested in any way by the advancement of capital to any person, firm or corporation engaged or intending to engage in the envelope business. There was no stipulation in this agreement on behalf of the nine manufacturers nor the Standard Envelope Company to take any portion of the output of the particular manufacturer, he being merely awarded a certain percentage over a fixed amount of business that he failed to do. C, a manufacturer, having entered

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into a contract similar to that described, brought an action for damages for its breach. In the trial court, the plaintiff had judgment. On appeal to the supreme court this judgment was affirmed. On further appeal, both judgments were reversed, the court holding that:

(1) An agreement between independent manufacturers of a useful article controlling over eighty-five per cent of the business, whereby trade in such article may be restrained and its price unreasonably enhanced, tends to monopoly and is invalid; (166 N. Y. 304)

(2) "Contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade to prevent competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy and are void;" (p. 299)

(3) "The scope of the contract, and not the possibility of self-restraint of the parties to it, is the test of its validity;" (p. 304)

(4) Whether a contract, made the basis for an action, was or was not entered into by the parties in good faith and without any intention to prevent competition or unduly enhance or maintain prices, in contravention of public policy, is a question of law for the court, and not one of fact for the jury; (p. 299)

(5) In the construction of contracts it is sometimes necessary to have as aids to the court the situation of the parties at the time of the execution of the contract, and all of the facts and circumstances surrounding it, in order to enable the court to determine just what the parties intended by it; and when the situation is such that it becomes necessary to prove those facts and circumstances, the question of construction is not transferred from the court to the jury, but instead the question of the construction of the contract continues to be one of law for the court, the facts and circumstances proved being availed of for the purpose of ascertaining the real intent of the parties, where otherwise it might be more difficult to ascertain them. (p. 299)

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## COLUMBIA CARRIAGE CO. v. HATCH.

(47 S. W. 288, Tex. Civ. App. 1898.)

**Trade-restraint; Sales.**

The carriage company sued upon promissory notes. The defendant pleaded specially that the notes were void under anti-trust laws of 1889 because given pursuant to a contract between plaintiff and himself whereby he was obligated to purchase certain goods exclusively from the plaintiff, the latter contracting not to sell its goods to any other person than the defendant in the entire state except in one town. The trial court sustained the defendant and gave judgment in his favor. On plaintiff's appeal, this judgment was affirmed, the court holding that:

(1) A contract of sale binding the purchaser to purchase exclusively from the seller not only his goods but all similar goods, and the seller agreeing not to permit his goods to be handled by any other person than the buyer within the state, one town therein excepted, is within anti-trust laws of 1889;

(2) The entire contract is void and unenforcible if founded upon a consideration part of which is illegal; and

(3) Promissory notes given in settlement or in pursuance of an illegal contract are void.



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## COLUMBIA WIRE CO. v. FREEMAN WIRE CO. et al.

(71 Fed. 302, U. S. C. C., Mo. 1895.)

**Patents; Corporations; Foreign Corporations; Parties; Proof; Infringement; Contracts.**

In this case a patentee made application for a preliminary injunction to restrain the infringement of a patented device. The motion was resisted on various grounds. An injunction was granted, the court holding that:

(1) A corporation formed for the purpose of acquiring patents and granting licenses thereunder which does not attempt to regulate and control the prices at which its licensees shall sell the patented articles is not within anti-trust laws; (p. 306)

(2) The jurisdiction of Federal courts over foreign corporations is unaffected by the failure of such corporations to comply with state foreign corporation laws; (p. 307)

(3) One of several wrongdoers, who is being sued, cannot escape liability because other wrongdoers are not joined in the action; (pp. 305, 306)

(4) Where there is no judicial adjudication by a court of concurrent jurisdiction on the validity of a patent, a preliminary injunction restraining its infringement may be granted in the absence of affirmative defenses on *prima facie* evidence arising from the grant and proof of acquiescence in the patentee's rights by manufacturers of, or dealers in, the patented or similar articles for such reasonable length of time as to inspire a strong conviction that the validity of the patent is unquestioned; (p. 303)

(5) Under the evidence there was such infringement of the patent as entitled complainants to a preliminary injunction; (p. 303)

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(6) No rights can be acquired under a contract void for want of mutuality; (p. 304) and

(7) Where a contract without a formal assignment or transfer is turned over to an assignee of a business, together with other property of such assigned business, the intention of the parties being that such contract shall pass under such transfer, the delivery of the contract with such intent is as effective to transfer rights thereunder as a formal assignment would be. (p. 305)

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## COMER v. BURTON-LINGO CO. et al.

(58 S. W. 969, Tex. Civ. App. 1900.)

### Contracts; Vendor's Covenant Aiding Unlawful Combination.

Three out of the only four lumber dealers in a locality bought out the fourth, the seller agreeing not to engage in business within a specified locality for a limited time. One of the members of the seller's firm disregarded the agreement and resumed business. Whereupon the vendees sought to restrain him from continuing the violation of said contract. In defense he claimed that the covenant sought to be enforced specifically was part of a scheme of the vendees to create a monopoly and control prices in lumber. The plaintiffs by general demurrer admitted the truth of the facts pleaded in defense. On sustaining the demurrer, the cause was tried and resulted in plaintiffs' obtaining an injunction and a fixed amount of damages. This judgment was reversed on appeal, the court holding that:

(1) Where, instead of a single purchaser—person, firm or corporation—two or more dealers unite in buying a competitor's business and goodwill, and for one of the purposes prohibited by anti-trust laws the seller covenants as part of the sale not to resume business for a limited time at a specified place, such contract is within the statute and void; and

(2) All contracts and agreements in violation of the anti-trust law (Rev. St. 1895, art. 5313) are absolutely void, and non-enforcible, either at law or in equity.

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## COMMONWEALTH v. BAVARIAN BREWING CO.

(23 Ky. Law Rep. 2334, 66 S. W. 1016, 1902.)

An association which effectively regulates and controls the consumer's price for an article by fixing its price of distribution to brewer's customers is within the prohibition of sec. 3915, Ky. Stats.

### NOTE.

Apparently this case is in direct conflict with Commonwealth v. Grinstead; and being a later decision, the authority of the Grinstead Case appears to be destroyed. A careful study of these cases, however, will enable any one to distinguish them in this—that they both turn upon the character of and effectiveness with which each association controlled prices.

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## COMMONWEALTH v. GRINSTEAD et al.

(21 Ky. Law Rep. 1444, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471, 1900.)

**Statute, Kentucky; Repeal; Constitutional Law; Pleading.**

Manufacturers of certain brands of various kinds of groceries of established reputation, to prevent these goods from being brought into competition with goods of inferior grade, protected them as "contract goods." This was partly accomplished through a voluntary association known as the Kentucky Wholesale Grocers' Association by said association receiving information of changes in the price upon said articles from the manufacturer and sending that information immediately to its members. There was no obligation on the part of any member of the association to the other members to fix, control or regulate the price of any of the goods, except as to "contract goods," or goods upon which the manufacturer put a fixed selling price, the manufacturer alone regulating and controlling the minimum price at which the jobbers could sell the goods, which was done by requiring the customers to agree not to resell the goods at a price less than that fixed by him. The association, also, through its officers, obtained from various carriers freight rates to and from different points and published them in a rate book for the benefit of members and others. The defendants, as members of this association, were indicted under Act of May 20, 1890 (secs. 3915-3917), Ky. Stats.), the indictment charging them, in the language of the statute, with criminal conspiracy. To this indictment the court sustained a demurrer. In affirmance of this judgment, on appeal, it was contended that (a) said act was repealed by section 198, Constitution 1891, and because it was inconsistent with section 1 of the schedule of that instrument;

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(b) that said act was repealed because of its omission from (Act of April 10, 1893) the general act revising the criminal laws; (c) that the indictment was fatally defective in not alleging facts sufficient to constitute an offense either at common law or under the statute. But the judgment was reversed, the court holding that:

(1) Section 198, Constitution 1891, requiring the general assembly "to enact such laws as may be necessary to prevent all trusts, pools," etc., merely imposes upon the legislature a duty, not a grant of new power, leaving to the legislature the choice of the legislative machinery to effect the required purpose and the discretion as to how much machinery will be required to be effective, and does not repeal, by implication or otherwise, Act of May 20, 1890;

(2) A constitutional provision merely imposing a duty upon the legislature, does not conflict with a power already in existence or exercised; (108 Ky. 65)

(3) A prohibition of a combination to fix, control, or regulate the price of any article, as provided by section 3915, Kentucky Statutes, etc., is greater than, and necessarily includes within its meaning, a prohibition of combinations to depreciate any article below its real value, or to enhance the cost of any article above its real value. as provided by section 198, Constitution 1891, and therefore the two provisions are not conflicting; (p. 65)

(4) "Inclusion is not conflict;" (p. 65)

(5) Section 1 of schedule, Constitution 1891, declaring that certain laws shall cease upon the adoption of the constitution, applies only where inconsistency exists; (p. 67)

(6) Act April 10, 1893, revising the criminal laws does not repeal Act of May 20, 1890, upon the subject of "pools, trusts, and conspiracies," because the Act of 1893 does not legislate upon that subject; (p. 68, *et seq.*)

(7) General laws are regarded as repealing prior laws only when that purpose is plainly shown by the context of the particular statute, or otherwise; (p. 69)

(8) A statute prohibiting any combination to regulate or

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fix prices and to limit production, which does not prohibit an *unreasonable* advance or an *unjust* depreciation of prices, is sufficiently definite and certain; (pp. 69, 70)

(9) The first sentence of section 3917 providing punishment by fine for a violation by "any corporation, company, firm, partnership, or *person*, or association of persons" was intended to impose punishment solely upon corporate entities which might violate the statute—the word "person" is a mistake, and should be discarded; (pp. 70, 73)

(10) The second sentence of section 3917, providing punishment by fine or imprisonment in the county jail, or both, for violation by any president, manager, director or other officer or agent, or receiver of any corporation, company, firm, partnership or any *corporation, company, firm*, or association, or member of any corporation, firm or association, or any member of any company, firm, or other association, or any individual" was not intended to apply to any artificial person, but solely to natural persons generally occupying an official relationship to artificial persons, or holding membership in them, and should be construed as governed by the preposition "of" before the words italicized; (p. 70, *et seq.*)

(11) "When the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, to inconvenience or absurdity, hardship or injustice, not presumably intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This is done sometimes by giving unusual meaning to particular words, sometimes by altering their collocation, or by rejecting them altogether, or by interpolating other words; the court having an irresistible conviction that the modifications thus made are mere corrections of careless language, and give really the true intention;" (p. 72)

(12) The maxim *Ut res magis valeat quam pereat* (that a thing may rather have effect than be destroyed) is appli-

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cable to the construction of a statute of doubtful meaning and validity; (p. 72)

(13) "The debates of a legislative body have little practical value in ascertaining the meaning to be given to the action of such bodies, and are of value chiefly in so far as they show that the attention of the body was called to the existence of facts which might influence its action;" (p. 75)

(14) Where the words of a statute are descriptive of the offense, an indictment following the language of a statute is sufficient; (p. 74) and

(15) Under the anti-trust laws of Kentucky it is not necessary to set forth the means adopted to effect the object of the combination. (p. 74)

NOTE.

At the time the decision in the foregoing case was rendered, the court of appeals consisted of seven justices. Du Relle, J., rendered the decision in which four justices concurred. Barnam and Hobson, JJ., dissented without writing opinions.

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## COMMONWEALTH v. STRAUSS.

(191 Mass. 545, 78 N. E. 136, 6 A. & E. Ann. Cas. 842, 1906.)

### Contracts; Exclusive Sale.

An agent of the Continental Company was indicted and convicted because he contracted with a dealer in behalf of said company to give him a certain percentage on sales if he sold said company's tobacco exclusively. The verdict was excepted to and the exceptions overruled, the court holding that:

(1) Sec. 1, c. 56, Rev. Laws 1902, is a legitimate exercise of the police power of the state, having been enacted in the interest of the public health and safety; (78 N. E. 138)

(2) Statutes passed in the interest of public health, public safety and public morals are interpreted broadly and liberally. Statutes passed for the public welfare must receive a strict construction "so as not to include everything that might be enacted on grounds of mere expediency;" (p. 137)

(3) A state statute which only indirectly affects interstate commerce is not unconstitutional; (p. 139)

(4) The term "exclusive sale" means "selling within a prescribed territory, to the exclusion of all other persons, so that in the designated place the purchaser who makes such a contract with the original seller will have the control of the market for resale;" (p. 136) and

(5) A contract between a wholesaler and dealer, binding the dealer to deal in the wholesaler's goods exclusively, within a prescribed territory, is within said law. (p. 137)

NOTE.

On a former conviction (188 Mass. 229, 74 N. E. 308) the verdict was excepted to and exceptions sustained by the supreme court on the ground that a contract whereby a dealer is permitted to sell other goods than those purchased from a wholesaler, and is merely given an inducement if he sell exclusively the goods of the wholesaler, is not within sec. 1, c. 56, Rev. Laws 1902.

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## CONNOLLY v. UNION SEWER PIPE CO.

(184 U. S. 540, 46 L. ed. 679, Ill. 1902.)

**Appeal and Error; Defenses; Collateral Contracts; Constitutional Law; Statutes.**

In this case the payment of two promisory notes given to an alleged illegal combination for the purchase price of its merchandise and payment of an open account for similar merchandise was enforced against both debtors; notwithstanding the fact that the payee in the one case and the creditor in the other case, the same corporation in both cases, was claimed to have entered into an illegal combination in restraint of trade prior to the contracting of both indebtednesses. The points passed upon in this case were these:

(1) Where the unconstitutionality of a state statute is urged in the circuit courts of the United States because such statute is in contravention to the United States constitution, a writ of error lies directly to the United States court at the instance of either party;

(2) At common law, a suit for the price of goods (personal property) could not be defended on the ground that the vendor is engaged in restraint of trade, when the sale of such goods is in no way connected with nor is growing out of an illegal transaction or is made by an illegal combination; but where an anti-trust act expressly declares invalid all contracts made by illegal combinations for the sale of their products, and permits the vendee to set up such illegality to an action brought for the purchase price of an article sold by the combination the defense is good—the latter point was discussed, but not decided;

(3) Under the Sherman Act, contracts for the acquisition and disposition of property entered into by alleged illegal combinations not directly connected with or growing out of such combination or arrangement are not affected by said Act;

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(4) The 14th amendment to the constitution of the United States declaring that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws," forbids class legislation and discrimination; and

(5) "If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." (46 L. ed. 692.) The latter rule was held applicable to this case.

## NOTE

Justice Gray did not participate in the decision of the case. Justice McKenna dissented on the ground that the particular classification was justifiable under the decision of American Sugar Refining Company v. Louisiana (179 U. S. 89, 45 L. ed. 102, La. 1900), which involved state taxation. The whole gist of the dissenting opinion is that the Louisiana law held constitutional and the Illinois law held unconstitutional are similar, if not identical, classifications of persons. The majority opinion might well rest on the unreasonableness of the classification in the Illinois Act, which was a criminal statute, while the Louisiana law was a revenue measure, and the reasonableness or unreasonableness of the classification could not operate the same way.

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## CONSUMERS' OIL CO. v. NUNNEMAKER.

(142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193, 1895.)

**Restraint of Trade, Public Policy; Sales, Vendor's Covenant; Illegal Contracts; Practice.**

Nunnemaker in 1893 was engaged in the oil business exclusively within the city of Hammond, Indiana. On the 3d of February of that year, in consideration of $300, he sold out his business, including property and good will, to B, agreeing, in part consideration of the sale, that he would neither directly nor indirectly for five years compete in any way with the vendee, nor his assigns, within the state of Indiana outside of Indianapolis. B assigned this contract to C, a corporation. Upon Nunnemaker's resumption of the oil business in the city of Hammond, C brought an action to restrain him from continuing in such business, alleging his insolvency. The defendant demurred to the complaint, which demurrer was sustained. In affirming this judgment, it was held that:

(1) A contract in general restraint of trade is invalid, being against public policy; but one restraining a party from trading within reasonable limits so as not to be injurious to the interests of the public, is valid and may be enforced by an injunction, upon a proper showing of facts; (142 Ind. 563)

(2) "Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good;" (p. 564)

(3) The good will of a particular trade or business is a species of property, possessing a market value, and is subject to sale or disposal; (p. 564)

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(4) Where a person sells or disposes of a business and its good will, the law will only sustain a restraint as to his future engagement in such business or pursuit, as will appear from special circumstances to be reasonable and useful, and when the restraint of the covenantor is not larger than is necessary for the protection of the covenantee in the enjoyment of his trade or business, depending upon the nature of the particular trade or business and the territory over which it extends at the time of the sale; (p. 564, *et seq.*)

(5) When a contract is or can be so separated into parts as to constitute two agreements, one illegal and the other legal, the latter may be enforced and the transaction *pro tanto* sustained; but it is otherwise where the contract in its nature is indivisible; (p. 568) and

(6) Whether or not a particular contract is in reasonable restraint of trade is a question of law for the court to determine under all the facts and circumstances in each particular case. (p. 564)

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## CONTINENTAL INSURANCE CO. v. BOARD OF FIRE UNDERWRITERS OF THE PACIFIC et al.

(67 Fed. 310, U. S. C. C., Cal. 1895.)

**Restraint of Trade, Competition; Conspiracy; Courts.**

Representatives of several fire insurance companies constituted the Board of Fire Underwriters of the Pacific, a voluntary organization. Its constitution and rules, among other things, provided for the regulation of premium rates, prevention of rebates, compensation of agents and non-intercourse with non-members. A violation of the rules of the board subjected the offender to the cancellation of risks covered, to prohibition against writing or placing insurance within one year, and to an increase of rates. In a bill for an injunction brought by an insurance company against the members of said board it was substantially alleged that the defendants had unlawfully combined to stifle competition, to prevent complainant, a corporation, from carrying on its business by coercing its agents and customers and by unjust discrimination. A preliminary injunction having been issued, on a hearing of the case the injunction was continued against such of the defendants as were guilty of improper methods of competition; the injunction was dissolved as to the other defendants, the court holding that:

(1) A voluntary association of fire insurance underwriters whose object is to regulate the business of its members, prevent ruinous competition in rates and promote their business interests, is not a conspiracy in restraint of trade;

(2) Where no contractual right or duty is interfered with, it is not unlawful for a principal to discharge an agent because of his employment by a competitor, or for a prin-

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cipal to require an agent to elect whom he will serve exclusively; (p. 322)

(3) The refusal, by a person or private corporation, to deal with a competitor, is not *per se* unlawful; (p. 322)

(4) An act done or threatened by a competitor having the effect of misleading the public and calculated to produce injury is unlawful; (p. 322)

(5) Threatening or intimidating a competitor's agents and customers is an unlawful act; (p. 323)

(6) The gist of an action of conspiracy in restraint of trade is that there exists actual damage as the result from illegal means; (p. 322) and

(7) The function of a court is to administer the law as it is, not as it ought to be. (p. 318)

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## CONTINENTAL WALL PAPER CO. v. LEWIS VOIGHT & SONS CO.

(148 Fed. 939, U. S. C. C. A., Ohio. 1906.)

**Combinations; Construction; Interstate Commerce; Trust Defense.**

This was an action to recover a balance of $57,762.10 due on account of wall paper sold and delivered to defendants. The principal defenses to this action were that the National Paper Company, a corporation, owned or controlled wall paper factories within four named states; that said company, together with a large number of independent firms and corporations constituting ninety-eight per cent of all the manufacturers of wall paper in the United States, combined or conspired for the purpose of controlling the wall paper production in this country by suppressing competition among themselves and enhancing the price of that article to jobbers, wholesalers, retailers and consumers; that for this purpose the Continental Wall Paper Company was organized under the laws of New York with a capital stock of $200,000.00, divided into sixteen thousand shares, the shares being distributed among the conspiring firms and corporations in proportion to the production of each factory during a certain period; that the Continental Wall Paper Company was managed through seven directors, three of whom were selected by the National Wall Paper Company, three directors were selected by the other firms and corporations, and these directors chose a seventh; that each of the members of this combination entered into a so-called "vendor's" agreement with the Continental Wall Paper Company whereby, in consideration of the acquisition by the "vendor" of a certain portion of stock of the "vendee,"



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the "vendor" agreed to sell his or its entire manufactured product for one year to the "vendee" (the Continental Wall Paper Company), who agreed to act as exclusive selling agent and to resell said product to wholesalers and jobbers for the account of the "vendor" at certain uniform scheduled prices, this contract being subject to two renewals; that the Continental Wall Paper Company also entered into a contract with the only two manufacturers of wall paper machinery in the United States, by which said manufacturers agreed to sell wall paper machinery only to said combination; that competition in Canadian made wall paper was prevented by agreement with Canadian manufacturers; that all wholesalers and jobbers in the United States were compelled to sign a written agreement obligating themselves to buy their entire stock of merchandise from the Continental Wall Paper Company, or through other members of the combination, at uniform list prices; that the defendants were, for many years, engaged in the wall paper business and were selling wall paper to retailers and consumers in several states; that the defendants were threatened that unless they entered into an agreement similar to the one last mentioned, they could not purchase any wall paper from any of the manufacturers in said combination, who would make it impossible for the defendants to continue in business; that such contract was signed by the defendant pursuant to such threat; and that under such contract a considerable amount of business was transacted between the Continental Wall Paper Company and the defendants who were compelled to pay extortionate and unreasonable prices, amounting to about fifty per cent more than they would have paid if such combination had not existed. To this answer there was a demurrer. The demurrer having been overruled, the plaintiff declined to plead further; whereupon judgment was entered for the defendants, dismissing the petition with costs. In affirming this judgment, it was held that:

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(1) A combination between ninety-eight per cent of all of the manufacturers of an article of universal necessity, all of the manufacturers of machinery for the manufacture of such article, and wholesalers and jobbers of such article, for the purpose of controlling the production, maintaining and enhancing the price of such article, is within the Sherman Act;

(2) Where, before the combination or contract, the parties entering into it were engaged in state and interstate commerce, and at the time are residing and doing business in many of the states, and the article with reference to which the combination or contract is formed is sold to persons throughout the United States, such combination or contract, directly affects interstate commerce; (pp. 947, 948)

(3) Where the direct result of a combination is to restrain interstate or foreign commerce, the reasonableness or unreasonableness of the restraint is immaterial; (p. 946)

(4) The entire plan of an alleged illegal combination or agreement must be considered in determining the validity of any portion of it; (p. 948, *et seq.*)

(5) When the plan of a combination or agreement, taken as a whole, is unlawful, such illegality extends to every portion of such combination or agreement; (p. 948, *et seq.*)

(6) An illegal portion of an entire contract renders the whole contract unenforcible; (p. 948)

(7) Under the common law, an agreement or combination in restraint of trade is illegal to the extent that it cannot be made the basis for an action; (p. 948)

(8) Wall paper is a universal necessity; (p. 947) and

(9) When sales of goods are made under a contract forming a part of an illegal combination, entered into by the vendee under compulsion, an action for goods sold and delivered under such contract cannot be maintained.

NOTE.

February 25, 1907, the supreme court of the United States granted a writ of *certiorari* in the foregoing case. (27 Sup. Ct. 787)

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## COQUARD v. NATIONAL LINSEED OIL CO.

(171 Ill. 480, 49 N. E. 563, 1898.)

**Illegal Combination; Stockholder's Suit; Examination of Books.**

This was a stockholder's suit against a corporation to enjoin a proposed issue of bonds and payment of dividends, for the appointment of a receiver, for discovery, and to wind up its affairs. A demurrer to the bill was sustained and the bill dismissed for want of equity. In affirming the lower courts it was held that:

(1) The fact a corporation is a "trust" will not give any of its stockholders a right of action to have its charter forfeited, such forfeiture being enforcible only at the instance of the state;

(2) A participant in an illegal combination as stockholder has no standing in a court of equity for relief on his own account;

(3) Unless authorized by statute, courts of chancery have no jurisdiction to dissolve a corporation by declaring its franchise forfeited;

(4) A receiver for a corporation will be appointed and the corporation dissolved only when a party brings himself within the provisions of sec. 25, c. 32, Rev. Stats.;

(5) Before a person can enforce his right under Rev. Stat. c. 32, sec. 13, to examine books of account and records of a corporation in which he is a stockholder he must show a denial or abridgment of this right;

(6) When the payment of a dividend would not impair the capital of an otherwise solvent corporation, such payment is not unlawful; and

(7) When it is necessary for a corporation to avail itself of special services, in the absence of allegation that payment for such services was unauthorized, such payment will be presumed to have been made under proper authority.

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## COTTINGTON v. SWAN.

(128 Wis. 321, 107 N. W. 336, 1906.)

**Construction; Contracts; Trade Restraint.**

In the sale of a livery business the vendor agreed not to engage in the same business, directly or indirectly, so long as the vendee conducted such business in a certain village. Having broken this covenant, the vendor was sued for damages. He demurred to the complaint on the only ground that the contract was in restraint of trade. This objection was sustained by the trial court. Whereupon the case was brought up on plaintiff's appeal. The lower court was reversed, the court holding that:

(1) Whether a contract is in restraint of trade, and therefore invalid, depends upon the reasonableness of the restraint under the circumstances as ascertained from the situation, business and object of the parties; and

(2) An agreement by a seller of a business, as part of its sale, not to engage in such a business during a specified time within a certain locality, is not in restraint of trade.

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## CRAFT et al. v. McCONOUGHY.

(79 Ill. 346, 22 Am. Rep. 171, 1875.)

**Restraint of Trade, Partnership; Partial Restraint, Validity, Test; Pari Delicto.**

Previous to 1869, four parties were engaged in the grain business in a certain town, and in order to prevent competition between themselves, they in that year entered into a so-called partnership agreement. By this agreement it was stipulated to put in all of the individual grain houses at an aggregate number of shares apportioned among the parties; each party or firm to conduct business as though no partnership existed; to fix and abide by prices and grades of grain; to keep general accounts of all the grain purchased and sold by each at his own expense; to monthly divide the profits or losses according to the agreed proportions; and that the contract should continue for one year. The separate houses of these parties were held out to the public as competing firms. To keep the public in ignorance of said partnership, meetings were held at night at which prices for grain were agreed upon and rates for storage and shipment were fixed. After the death of one of the parties to this agreement an account in equity under said agreement was sought from one of his heirs. The defendant contended that the contract or arrangement in question was in general restraint of trade, and was therefore unenforcible. The trial court entered a decree against this contention. In reversing the lower court, it was held that:

(1) Although an agreement upon its face constitutes a partnership for the purpose of trading in a commodity, yet when from the terms of the contract and other proof, the

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true object is shown to be the formation of a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of such commodity, such a contract has the effect of restraining trade and commerce, and is therefore unlawful; (79 Ill. 349)

(2) "An agreement in general restraint of trade is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restriction reasonable;" (p. 349)

(3) When the restraint imposed by the contract is partial, but is unreasonable, oppressive and injurious to the public, it is unlawful; (p. 350) and

(4) A court of equity will not lend its aid in the division of the profits of an illegal transaction between associates, although the contract under which the aid is sought has been executed. (p. 350)

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## CRAVENS v. CARTER-CRUME CO.

(92 Fed. 479, U. S. C. C. A., Ohio. 1899.)

**Contracts in Aid of Unlawful Combination; Practice.**

A sum of money was claimed under a guaranty that dividends of a certain selling corporation to be declared during a named period would amount to a specified figure. This selling company was organized by various independent manufacturers of wooden dishes, controlling about eighty per cent of the total product of the country, for the purpose of handling the entire output of their factories, bringing them under the control of the selling company for the regulation of prices, and, if necessary, to limit production by shutting down any of the factories. The contract sued upon was part of the means employed to effect this object. The plaintiff was one of the parties who participated in formation of the selling company. Judgment having been rendered against him, he appealed. On appeal the judgment was affirmed, the court holding that:

(1) A contract is unlawful and unenforcible when it constitutes one of the steps in an unlawful combination and is intended to be one of many by which the object of the combination is to be accomplished; (p. 486)

(2) Where the direct purpose of a contract is to establish a combination among manufacturers and tradesmen whose function is to prevent competition, diminish production, and increase prices, such contract is unlawful and unenforcible; (p. 486)

(3) A peremptory instruction directing the jury to find for either of the parties supersedes previous instructions, leaving the jury to find the facts according to the evidence; (p. 484) and

(4) In order to be available on appeal, the reason or reasons for objecting to the admission of evidence should be stated at the time an objection is made. (p. 484)

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## CRUMP v. LIGON.

(84 S. W. 250, Tex. Civ. App. 1904.)

### Trade Restraint; Vendor's Covenant

C, as part of the consideration for the purchase of his interest in a partnership drug business conducted by himself and L, agreed not to compete with the latter so long as he remained in said business at a certain town. Upon C's violation of this contract L brought suit to restrain a further breach of said contract and for damages. Judgment was rendered in L's favor. In affirmance of this judgment it was held that

(1) Under the common law a seller may, as part consideration for the purchase of his business by another, agree not to engage in a similar business within a specified locality during a definite time;

(2) 1903 anti-trust law does not affect contracts previously entered into;

(3) Where a contract is broken, the plaintiff is entitled to at least nominal damages;

(4) A judgment will not be reversed for harmless error; and

(5) Instructions are sufficient which substantially present the issues raised by pleadings.

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## CRYSTAL ICE CO. v. WYLIE.

(65 Kan. 104, 68 Pac. 1086, 1902.)

### Contracts, Collateral.

C (a corporation) agreed to furnish W ice at certain prices during a fixed period. Before fulfilling this contract C sold out its entire business to another, thereby disabling itself from proceeding with the contract. In a suit by W against C for damages on account of such breach, it was proved that C sold out to an alleged illegal combination. By reason of this fact W was awarded attorneys' fees as part of his damages. This judgment was reversed, the court holding that:

(1) A contract in no way connected with an illegal combination is unaffected thereby;

(2) A party's motive or willfulness for breaking his contract in no way affects the damages recoverable for the breach; and

(3) A wrongdoer cannot excuse himself or obtain immunity from his wrongful acts by another's guilt of an independent wrong or violation of law.

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## CUMMINGS v. UNION BLUESTONE CO. et al.

(44 N. Y. Supp. 787, aff'd 164 N. Y. 401, 58 N. E. 525, 79 Am. St. Rep. 665, 1897-1900.)

**Trade Restraint; Wholesalers and Retailer.**

In this case damages were claimed in a large amount on account of breach of contract. The contract relied on was made in 1887 between fifteen wholesalers of bluestone, who controlled ninety to ninety-five per cent of the entire product sold in the state, on the one hand, and the Union Bluestone Company on the other, the latter undertaking for six years to market the entire manufactured product of these fifteen wholesalers at prices to be fixed by the Bluestone Association, composed of the principal contracting wholesalers. The wholesalers agreed to supply bluestone to the Union Bluestone Company, exclusively, in certain proportions. The breach consisted in the Union Bluestone Company's alleged refusal to carry out said contract as to the plaintiff by failing to require him to furnish the agreed quota of his goods to be sold. At the conclusion of all the evidence the court directed the jury to find for the defendants; first, because the contract was in restraint of trade, and, second, because there was no evidence of a breach of said contract. On plaintiff's appeal, the judgment of the lower court was affirmed, the reviewing court holding that:

(1) An agreement between nearly all of the wholesalers in a locality and a corporation is in restraint of trade when the wholesalers control ninety to ninety-five per cent of the manufactured stock sold in the state and the wholesalers' entire stock is to be sold by said corporation as sales agent

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at prices fixed by a common body chosen from among the wholesalers;

(2) Where the terms of, and the acts done under, a contract alleged to be illegal are undisputed, whether such contract is or is not lawful is a question of law;

(3) Where there is no question of fact to be submitted to the jury, a direction to find for either party is proper; and

(4) The plaintiff failed to prove a breach of the contract involved.

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## CURRIER v. CONCORD RAILROAD CORPORATION et al.

(48 N. H. 321, 1869.)

**Construction; Self-Incrimination; Parties; Pleading.**

Prior to the enactment of Act of July 5, 1867, two competing railroad companies entered into contracts whereby the operation of their railroads were consolidated and placed under one management, and their earnings pooled in equal proportions. One of said railroads withdrew the traffic from the other by subsequently entering into traffic arrangements with two other railroad companies. To stop a continuation of the operation of said railroads under these contract arrangements sundry citizens of the state brought a bill in equity against the first two railroad companies, charging them with a violation of the Act of 5 July, 1867, against railroad monopolies. The bill sought discovery and an injunction to restrain certain specified acts. On overruling a demurrer to the bill, it was held that:

(1) Sec. 10, c. 150, General Statutes, does not repeal Act of July 5, 1867, on the principle "that a repeal will not be implied unless the inconsistency is such that the two laws cannot stand together;" (p. 330)

(2) So much of Act of July 5, 1867, as provides that upon application under it the officers shall be liable to examination under oath touching its infringement is unconstitutional and against the common law rule that "no law can be made that shall compel a person to accuse himself of crime or furnish evidence against himself, either by testifying upon his trial for the offense charged against him, or being compelled in some other cause to disclose his guilt in such a way that

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his statement can be given in evidence to convict him of such offense;" (p. 332)

(3) In a suit for violation of the provisions of Act of July 5, 1867, against railroad monopolies it is not necessary to allege that the plaintiffs are specially interested or have been injured by such violation, the object of the act being merely to enforce a penalty for a public wrong and prevent its commission; (p. 326)

(4) When a demurrer applies to the whole bill and is good to a portion only, the demurrer will be overruled; (pp. 327–330) and

(5) A defendant may demur to the discovery alone or so much of it as he cannot make without incriminating himself where a bill in connection with other relief seeks such discovery as would subject him to penalties or tend to incriminate him, if apparent on its face; but, when it does not appear on the face of the bill that the discovery sought would have these consequences, the defendant should protect himself by plea. (p. 330)

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## DAVIS et al. v. A. BOOTH & CO.

(37 Chi. Leg. N. 112, 131 Fed. 31, U. S. C. C. A., Mich. 1904.)

**Equity Jurisdiction; Trade Restraint; Vendor's Agreement.**

In 1898 a corporation sold to an individual by bill of sale with warranty of title all of its properties, including the good will of the business. As an inducement to this sale, by separate agreement, but ancillary to said sale, the stockholders of the selling company agreed not to engage, directly or indirectly, at certain places, and for a definite time, in a similar business to the one sold. Subsequently some of these stockholders violated their agreement by organizing a corporation to conduct a similar business. To restrain a continuation of this breach, a bill was filed by the assignee of the individual with whom the ancillary agreement was made. The court granted a preliminary injunction in accordance with the prayer of the bill. On appeal, this injunction was modified, the court holding that:

(1) Where it is difficult to estimate damages that might result from a threatened or actual breach of a contract, and in order to avoid a multiplicity of suits, equity has jurisdiction to prevent or stop such breach; (p. 36)

(2) Where a contract for the sale of a business binding the seller not to engage in a similar business is valid on the face of it, a preliminary injunction to restrain a violation of such contract will be granted; (p. 37)

(3) A contract binding the seller of a business not to engage in a similar business during a specified time within a certain locality is not within Michigan anti-trust law of 1889; (p. 37)

(4) An agreement by a seller of a business, and its good

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will, in part consideration for the sale, not to engage in a similar business during a specified time within a limited locality is not in restraint of trade. But where, as part of sale of a business, the seller agrees not to compete with the buyer and acquires an interest in the buyer's business, such an agreement or covenant might be in restraint of trade; (p. 38)

(5) The agreement involved covered only such territory in which the seller had an established place of business; (p. 38) and

(6) The injunction was too broad as to one of the defendants. (p. 39)

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## DELZ v. WINFREE et al.

(6 Tex. Civ. App. 11, 25 S. W. 50, 1894.)

### Combination Against Delinquent Debtors.

This was an action for damages brought by a butcher against two of the principal wholesalers of meats in a certain locality on account of their refusal to sell him meat for his business. The defendants pleaded specially that plaintiff, long prior to said refusal, was indebted to each of them, and their refusal to sell him meats was made because he failed to liquidate such indebtedness. The trial of this case resulted in a judgment for defendants. On appeal, it was held that:

Wholesalers may agree among themselves, when not done with the intention of injuring any particular dealer, not to sell to dealers who are indebted to any of the wholesalers, in order to protect themselves against dishonest and insolvent dealers, and for the purpose of compelling them to pay their debts.



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## DENNEHY v. McNULTA.

(86 Fed. 825, 41 L. R. A. 609, U. S. C. C. A., Ill. 1898.)

**Rebates; Contracts; Collateral Attack; Payment.**

The Distilling & Cattle-Feeding Company issued a number of non-negotiable rebate certificates to Dennehy & Co. promising on condition or in consideration of continuing their patronage for six months to pay a certain amount based upon a proportionate part of actual purchases made at the same time the certificates were issued. Neither Dennehy & Co. nor the holder of said certificates performed said condition. Nevertheless, a holder of said certificates made claim under them for a large amount. On a hearing before a special master, and upon his report, these claims were disallowed. In affirming the decree of disallowance, it was held that:

(1) The giving of a rebate, as part of an actual sale of goods, conditioned on continuous and exclusive dealing with the seller for a specified time, is not in itself unlawful; (86 Fed. 828)

(2) Where an obligation depends upon a precedent condition, the obligor cannot be placed in default without performance of the condition, unless by his acts or conduct he waives such condition or excuses its performance; (p. 828)

(3) Where a condition in an indivisible contract is illegal, the whole contract is void and unenforcible; (p. 828)

(4) The fact that a corporation constitutes a monoply and its general business is illegal does not affect its contracts unconnected with such monoply or illegality; (p. 827) and

(5) One who voluntarily and knowingly deals with an unlawful combination, purchasing its goods, and paying

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for them at stipulated prices, cannot recover back part of such moneys, as money had and received, on the ground that the prices were beyond the fair and reasonable prices and were induced by such illegal combination. (p. 828)

NOTE.

Proposition one (1) is not in the opinion but was necessarily involved in the decision of the case.

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## DETROIT SALT CO. v. NATIONAL SALT CO.

(10 Detroit Leg. N. 366, 96 N. W. 1, Mich. 1903.)

**Evidence; Admissibility; Trade Restraint; Practice; Question of Fact or Law; Illegal Contract Unenforcible.**

In 1899 a Michigan corporation entered into a contract with a New Jersey company whereby the Michigan corporation agreed for five years to deliver its entire product of salt to the New Jersey company at certain fixed prices. It was generally admitted that on its face the contract was perfectly valid. After carrying out the provisions of this contract for nearly two years, the New Jersey corporation refused to further proceed under it. Whereupon the Michigan company brought suit against the New Jersey company for the purchase price of a certain quantity of salt. The action was defended on the ground that the contract was in restraint of trade and against state and national anti-trust laws. A trial resulted in plaintiff recovering judgment for a large amount. On appeal this judgment was reversed, the court holding that:

(1) Where a contract, legal on its face, is claimed to be in restraint of trade, it is proper to show the circumstances attending its making, the purpose had in view, and the construction placed upon it by the parties, as evidenced by their dealings under it; (96 N. W. 7½)

(2) When there is dispute and uncertainty as to the object, purpose, intent and knowledge of the parties to a contract not illegal on its face, the question of legality is for the jury. But, where all of the evidence is consistent only with an unlawful object and purpose on the part of all parties to the transaction, it is otherwise; (p. 7½) and

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(3) Courts refuse their aid to either of the parties to an illegal contract or transaction. (p. 8)

NOTE.

The dissenting opinion by one judge rests solely upon the ground that under the peculiar circumstances of the case the question of validity of the contract should have been left for the jury to determine and was not a proper question for the court; and that inasmuch as the jury, under proper instructions from the court, found the contract to be legal, their verdict and judgment should be affirmed.

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## DIAMOND MATCH CO. v. ROEBER.

(106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, 1887.)

**Contracts; Trade Restraint; Vendor's Covenant; Assignment; Specific Performance; Ultra Vires.**

R, in consideration of about $47,000, of which $28,000 were to be paid in notes or by the purchaser's shares of stock, and about $19,000 in cash, sold his entire manufacturing plant in New York, stock, materials, trade-marks and good will to a Connecticut corporation, covenanting, as part of the sale, not to engage, directly or indirectly, in such business for ninety-nine years within any of the states of the United States, except Nevada, the then Territory of Montana and District of Columbia. He also executed a bond for a large sum of money as liquidated damages payable to the Connecticut company in case of breach of said covenant. Within a short time of the making of these contracts, the Connecticut corporation sold all of its property to the Diamond Match Co. R then accepted from the Diamond Match Co., in place of the $28,000, $8,000 cash and the remainder shares of stock of said company. Upon R's breach of said covenant the Diamond Match Co. proceeded by injunction to obtain relief. In the court below the plaintiff had judgment. This was affirmed on appeal, the court holding that:

(1) A contract in partial restraint of trade, if reasonable under the circumstances, although practically unlimited as to time, is valid; (60 Am. Rep. 470, 471)

(2) The nature of the business and not state lines controls the question whether a contract is or is not in general restraint of trade; (pp. 470, 471)

(3) A vendor's covenant made in connection with the

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sale of a business not to engage in a similar business for a definite period within certain territory, is in the nature of a property right and assignable; (p. 472)

(4) Performance of a contract and not stipulated damages provided in the same instrument or by collateral agreement will be enforced in equity, unless it appears from the whole instrument and the circumstances surrounding its execution that the payment of damages, and not such performance, was intended; (p. 471)

(5) Under the doctrine of comity, a foreign corporation may resort to courts of other states than the one in which it was organized; (p. 472) and

(6) One who retains the benefits derived from a contract with a corporation cannot raise the question of *ultra vires* the powers of that corporation. (p. 472)

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## DICKERMAN v. NORTHERN TRUST COMPANY et al.

(176 U. S. 181, 44 L. ed. 423, Ill. 1900.)

**Corporations, Organization; Illegal Combination, Mortgages; Actions, Motive; Foreclosure, Set Off, Evidence.**

B and R representing certain capitalists, in February, 1892, obtained options for the purchase of about thirty-nine out of seventy straw paper mills doing business in the northwestern states, and having a practical monopoly of the manufacture of straw paper. These options were taken for the purpose of turning them over to a corporation to be organized by B and R with a capital stock of $4,000,000. It was understood that the entire seventy mills were to be thus optioned. The options did not specify the number of mills that were to join. The total consideration for these options was the sum of $2,788,000 payable part in cash ($766,000), part in preferred stock ($629,000), part in common stock ($1,258,000), and part in notes ($135,000) of the new company. Afterwards, these options were turned over by B and R to S. The Columbia Straw Paper Company was thereupon organized under the laws of New Jersey, its articles of incorporation having been filed with the secretary of state December 6, 1892. B and two others were its incorporators. Immediately after such organization the three incorporators with six others, met in New Jersey and elected themselves as the first board of directors. On the 10th of December, 1892, S, assuming to act as an independent owner, although he had obtained the options for the benefit of the Columbia Straw Paper Company and had promised to pay for them in the stock of that company, made a written proposition to said board of directors to sell the thirty-nine mills to the paper company for $5,000,000. On the same day this

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proposition was accepted by the stockholders, who also instructed themselves as directors to accept. B, as president, was then authorized to enter into a proper contract with S for said transfer, which was done. This board of directors served only two weeks and was succeeded by B, S, H, and others. The mill owners were then required to deposit their title deeds and abstracts with a Chicago firm. A New York firm raised money to pay for mortgage bonds, depositing over $800,000 with the Northern Trust Company to be disbursed to the mill owners, and which was to be checked out by its personal agent, who made settlements with the mill owners and took over their properties by giving checks payable to S, who indorsed them over. On or about December 31, 1892, the Columbia Straw Paper Company gave a deed to the Northern Trust Company, securing the payment of one thousand bonds, which bonds were issued and delivered to S in part payment of the properties acquired by the Straw Paper Company from him. The syndicate received 3,787 shares of preferred and 14,762 shares of common stock from the treasury of the company, aggregating 18,549 shares of the par value of $1,854,900. As it took but $1,887,000 of the stock at par to acquire the mills, this left $258,100 unaccounted for. This, it was explained had gone to the promoters and their friends. By adding this $258,100 to the $1,854,900, the amount is $2,113,000, which is the total capitalization of $4,000,000 less the $1,887,000 that went to the mill owners. As thus organized, the corporation began to do business and raised the price of paper $6 a ton. This invited competition, and a new corporation was organized by the New York firm under the laws of New Jersey, called the Paper Commission Company. The sole function of this company was to sell the product of the Straw Paper Company and the other paper mills which had not given options, the Straw Paper Company paying the new company a com-

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mission of twenty-five per cent for selling all its paper, reducing the net price realized by the Straw Paper Company to less than it had obtained in selling its own paper. Only sixteen of the thirty-nine mills were thus actually operated. The mill owners, although the largest stockholders, never seem to have been treated as a factor in these operations. In some way or other the syndicate got possession of $2,113,000 in stocks and bonds, which they appear to have used in the furtherance of their own interests. None of the mill owners who expected to be stockholders were placed on the first board of directors, and none of them appear to have known what took place in New York. The mortgage given by the Straw Paper Company contained a provision that it should become enforcible, if the trustees should declare the principal and interest upon the bonds to be immediately payable, should any execution be levied or sued out against the chattels or property of the company and such company should not forthwith, upon such execution being levied or sued out, remove, discharge or pay the same. On January 22, 1895, the Paper Company being insolvent and its directors and trustees being desirous to foreclose the mortgage, had a bondholder bring suit before a justice of the peace in Chicago, Illinois, against the company upon six coupons. Summons was issued returnable January 28, 1895, and served upon the president of the company at five o'clock P. M. on the day it was issued (January 22d). On the same afternoon, the president appeared before the justice of the peace and consented to an immediate trial, which resulted in a judgment for $180. Execution being sworn out, it was issued and placed in the hands of a constable at about half-past five o'clock of the same day. Later on the same day the trustees gave notice to the company that by reason of such execution having remained unpaid, they declared the principal and interest upon the one thousand bonds to be immediately payable, and upon the same night the trustees took possession of the property of the company in the vicinity of Chicago, the

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officers and agents of the company making no resistance. In the usual bill to foreclose a mortgage it was alleged as the only grounds for enforcing the security that the mortgagor had made default: (a) in redeeming or discharging the several amounts of bonds designated in the mortgage; (b) in failing to pay certain instalments of interest; and (c) in failing to pay a certain execution sued out against the property of the company upon a judgment obtained against it before a justice of the peace of Cook county, Illinois, by reason of which default the trustees had declared the principal and interest of the bonds to be immediately due and payable. On being permitted to become parties defendant, Dickerman and others answered by original and amended answer setting forth the manner in which the combination had been formed, claiming that by reason of fraudulent overvaluation of the various mills, plants and properties upon which options of purchase had been taken, a defense in the nature of a set-off existed in favor of the company against such bondholders as were also stockholders to the extent of the unpaid part of the stock held by them; that the judgment and execution before said justice of the peace was a fraudulent and collusive act on the part of the managers of the defendant company, in order to give the trustees the right to begin the foreclosure proceeding; and that the bonds and mortgage were part of an illegal scheme to create a monopoly, regulate prices, and prevent competition among the mills purchased, who had, prior to the consolidation, been in active competition with each other. The matter having been referred to a master, and he having found against the defendants, they filed exceptions to his report, which, upon a hearing by the court, were overruled, and a decree of sale *nisi* entered in favor of the original complainants. On appeal to the circuit court of appeals this decree was affirmed. In further affirmance by the supreme court, it was held that:

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(1) A corporation has a legal existence until formally dissolved, when its organization has been accomplished in conformity with the letter of the law, although its incorporators are mere tools used for the purpose of organization and had no real interest in the company; (176 U. S. 201)

(2) When not forbidden by charter or by any law or public policy, the declaration upon a certificate of stock that it is fully paid and nonassessable is a valid protection to innocent holders or their assignees from the collection by the corporation or its stockholders of any unpaid portion of the par value, although such declaration is no protection against creditors; (pp. 202, 203)

(3) When in the negotiation of bonds it is necessary to give a *bonus* of stock, such transaction will not be considered as a mere donation; (p. 202)

(4) So long as a corporation exists it has the power to create a valid mortgage; (p. 196)

(5) Where a trustee in a mortgage is not a party to a scheme culminating in the organization of an illegal trust or combination, a mortgage given by such corporation cannot be defeated by the mortgagor on the ground that the property covered by the mortgage is used for an illegal purpose; (p. 196)

(6) Bonds are negotiable when payable "to the bearer, or when registered, to the registered owner thereof" and when all of them are declared to be due on a day certain, but are redeemable separately by annual drawings or instalments; (pp. 194, 195)

(7) A promoter is any one, by whatever name, who aids in the formation and establishment of a corporation to carry on an enterprise; (pp. 203, 204)

(8) A promoter stands in a confidential relation to the proposed company and is bound to the exercise of the utmost good faith; (p. 204)

(9) A corporation organized for an illegal purpose can be attacked only in a direct proceeding; (p. 196)

(10) Where the particular action taken or the means employed by a party is lawful, the law will not concern itself

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with his motives for taking such action or using such means; (p. 190)

(11) Collusion, in a legal sense, does not exist where an action is brought with some ulterior object in view beyond the recovery of a judgment, when a just claim or indebtedness is due, when the action is conducted according to the forms of law with due regard to the rights of the parties, and so long as such object is not an unlawful one; (pp. 190, 191)

(12) Generally, the bringing and defending of actions involving corporate interests are within the discretion of directors and cannot be interfered with by stockholders; (p. 193)

(13) The term "forthwith" signifies that a thing is to be done as soon as by reasonable exertion it may be accomplished, implying a longer or shorter period according to the nature of the thing to be done, and is inapplicable to action taken prematurely or speedily; (p. 193)

(14) Where an insolvent corporation can no longer carry on business and consents to a foreclosure of its mortgage, a minority of stockholders cannot question the mortgagee's right to proceed; (p. 191)

(15) In a foreclosure proceeding, all bonds secured by the mortgage must be treated as an entirety, permitting no set-off against individual bondholders; (p. 206)

(16) In the foreclosure of a mortgage securing bonds, before a decree of foreclosure, it is sufficient to prove that the bonds are valid and are outstanding obligations, without showing in whose hands they are, or producing them, since in cases of corporate mortgages the bonds are often widely scattered, owned in foreign countries, or by persons totally ignorant that a suit of foreclosure is in progress, and an order to produce the bonds would only result in delaying a decree indefinitely, but after sale the bonds must be produced for payment and cancellation. (p. 194)

NOTE.

In the opinions of Justices Shiras and Peckham, the question of fraud was irrelevant to the issues, said justices concurring in the result.

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## DISTILLING AND CATTLE FEEDING CO. v. PEOPLE.

(156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200, 1895.)

**Corporate Monopolies; Consolidation; Public Policy; Quo Warranto; Pleading.**

In 1887 five Illinois, one Missouri and one Ohio corporations, one Ohio copartnership and a citizen of Ohio, all operating distilleries, entered into a trust agreement, which provided: (a) that the trust shall be vested in nine trustees, naming them; (b) that the trustees shall prepare trust certificates containing a stipulation that the holders thereof shall be bound by the terms of the trust agreement; (c) that before the agreement shall take effect such certificates shall be issued only for capital stock of subscribing corporations and assigned to and held by the trustees in the trust, and that after the agreement had taken effect, said certificates shall be issued for the purchase price of other companies engaged in, or organized for the purpose of, operating distilleries; (d) that the capital stock of the various corporations so acquired shall be held by the trustees and their successors during the full term of the agreement for the benefit of the trust certificate holders, subject to assignment of such shares of stock as shall be necessary for qualifying a holder as director of a constituent company; (e) that such trustees shall have power to form corporations for certain named purposes in accordance with the general scheme of said agreement, shall exercise complete supervision over the constituent companies, and as stockholders of such corporations shall elect others or themselves as directors and officers of such corporations; and (f) that such trustees shall keep all moneys derived from dividends or interest upon stocks or moneys, shall keep accounts and declare and pay dividends upon said trust certificates. Various

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other provisions were embodied in this agreement, relating to the manner of carrying out said trust, which was to continue for twenty-five years. By an information filed against the Distilling Company said agreement was set out in full, together with a form of a trust certificate. It was also shown that within a year of the making of said trust agreement eighty-one independent companies located in various parts of the United States were absorbed by the trust or combination; that in 1890 this combination took steps to and did organize a corporation under the name of Distilling and Cattle Feeding Company, under the general corporation laws of Illinois; and that immediately thereafter all of the trust property was conveyed to said company, and in addition thereto six other independent companies were brought up and some of their plants dismantled by said corporation. The defendant's pleas were twice demurred to, the last demurrer having been sustained and judgment of ouster entered. In affirming this judgment, it was held that:

(1) A trust agreement entered into for, and carried out with, the purpose of securing control of a manufactured commodity, so as to limit its production, dictate prices at which it shall be sold, monopolize its manufacture all over the country, and stifle competition, is void as against public policy; (156 Ill. 486)

(2) No corporation can be lawfully organized for the purpose of carrying out an illegal combination; (p. 490)

(3) Where, for the purpose of establishing a monoply in the business in which a corporation is engaged, such company acquires by purchase or otherwise properties and plants of other competing companies, firms or individuals, the same constitutes such an abuse of the corporate powers of the purchasing corporation as will warrant forfeiture of its corporate franchise, because the power of a corporation to acquire and hold property is limited to such property only as is necessary for carrying out the particular business to conduct which the corporation was organized; (p. 491)

(4) The regular and legal organization of a corporation

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is impliedly admitted by bringing *quo warranto* proceedings against it in its corporate name; (p. 481)

(5) In actions in the nature of *quo warranto,* the pleadings must conform, as near as possible, to the general principles and rules governing ordinary civil cases; (p. 482)

(6) A plea in a proceeding in the nature of *quo warranto* should follow the form of a plea at law; (p. 483)

(7) A plea is bad when it sets up matter partly in justification and partly in disclaimer. (p. 483) The reason for this rule is that in *quo warranto* proceedings a defendant must either disclaim or justify. A disclaimer entitles the people at once to judgment. Justification must set out defendant's title specially; (p. 482)

(8) A plea must not be evasive, argumentative or state immaterial matter; (pp. 483, 485)

(9) Where a plea attempts to raise a variety of issues, some material and others immaterial, such plea is double; (p. 484) and

(10) Where defects in a pleading demurred to are of such a character as may be taken advantage of on error, it is unnecessary to make a motion in the trial court to carry such a demurrer back to the former pleading in order to avail oneself of such defects. (pp. 485, 486)

NOTE.

The circumstance attending the organization of the Distilling and Cattle Feeding Company, and the manner in which the corporation was carrying out the former policy of the Distillers' and Cattle Feeders' Trust, warranted the court in saying that the different changes accomplished by the incorporation of said company were merely formal and not substantial. (p. 490)

This case still leaves it for courts to ascertain and say: (1) What is the real purpose of a particular organization; and (2) whether the direct purpose of the organization is to stifle competition, diminish production, and increase prices, or whether such result is merely indirect.

As to general right of corporation to consolidate, see 52 L. R. A. 369, 387n.

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## DITTMAN v. DISTILLING CO. OF AMERICA.

(54 Atl. 570, N. J. Ch., 1903.)

### Stockholding Corporation.

The Distilling Company of America was organized under the laws of New Jersey, one of the purposes, among others, being that of purchasing and holding shares of stock or property in domestic and foreign corporations. Under this power it acquired the capital stock and control of five corporations engaged in the manufacture, sale and distribution of whiskies, etc. Three of these companies were New Jersey corporations; one was organized in New York; and another was a Maryland corporation. By virtue of an agreement called the "Deposit Agreement" the Distilling Company became the owner of over ninety per cent of the capital stock of each of these constituent companies by issuing its own shares for the purchase from the individual holders of the stock of said companies. Although another of the organized objects of the Distilling Company was to manufacture, sell and distribute whiskies, etc., it did not exercise this power but was altogether a company holding the stock of the several constituent companies, and thus managing or controlling their business. One of the New Jersey constituent companies, the Kentucky Distilleries & Warehouse Company, organized under West Virginia laws two subsidiary companies, for the purpose of selling and distributing its products. Non-consenting stockholders of this company brought a bill against the Distilling Company of America and others questioning the right of the two companies, the Distilling Company of America and the Kentucky Distilleries & Warehouse Company, to organize and do business under their charters. In dismissing said bill, it was held that:



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(1) Under sec. 51 of 1896 New Jersey Corporation Act, a corporation may own and hold a controlling share of the capital stock of other domestic corporations when the purchase of such stock is made for the promotion of the business of the purchasing company; (p. 576)

(2) A New Jersey corporation may own and hold stock in a foreign corporation only when the laws of the state under which the foreign corporation was organized permits domestic companies organized for similar purposes to own and hold stock in other corporations; (p. 576)

(3) As incidental to or consequential upon the business a corporation is expressly authorized to transact, and, as a convenience for the attainment of its objects, a corporation created under the laws of New Jersey may organize subsidiary companies for the same purposes and with the same object; (p. 576)

(4) In the absence of proof regarding the existence of a particular right claimed under the laws of a foreign state courts will assume such right to exist under the laws of that state, if a similar right may be enforced under the laws and decisions of the state wherein such right is claimed; (p. 576½)

(5) A stockholder cannot complain against a corporation in which he holds stock on the ground that the effect of its charter and the acts done under it constitute a monopoly;

(6) Where a monopoly results from an exercise of the charter powers of a corporation, the only one to test such powers is the attorney-general in *quo warranto* proceeding; (p. 573)

(7) Courts of equity will not interfere with the action of directors of a corporation when it appears that they have acted in good faith for the best interests of the company and its stockholders and without fraud or abuse in the exercise of their discretion; (p. 574) and

(8) After the closing of proofs amendments are not permitted when they present a new or inconsistent case. (p. 576½)

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## NOTE.

This decision is not satisfactory on many of the vital points it attempts to decide. In the first place, the proceeding was not a proper one to permit the vice chancellor to fully examine into the full extent of the important questions raised. Whether the purposes for which the Distilling Company of America and the Kentucky Distilleries & Warehouse Company were organized were lawful or not could have been better inquired into had the proceeding been one brought by the attorney-general instead of stockholders of one of these corporations. In the second place, the decision is unsatisfactory, because the vice chancellor appears to be uncertain as to some of the ground he takes on the various questions. In the third place, the decision is not of the highest court in the state.

It is a serious question whether the Securities Case does not destroy the authority of the present case on the vital points it decides, although the Securities Case involves a *quasi*-public corporation.

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## DOWNING v. LEWIS et al.

(56 Neb. 386, 76 N. W. 900, 1898.)

**Trade Restraint; Vendor's Covenant; Injunction.**

D purchased from L the business and good will of a laundry establishment, the latter agreeing not to engage in the same occupation, directly or indirectly, for five years at a named place. L attempted to break his covenant. Whereupon D brought injunction proceedings. In reversing an order dissolving a temporary injunction and dismissing petition, it was held that:

(1) A vendor's covenant, as part of the sale of a business, not to engage within a specified locality for a limited period in a similar business, is not in restraint of trade;

(2) The laundry business is neither within the spirit nor letter of anti-trust law of 1889; and

(3) A vendor's agreement as part of a sale of a business not to engage in the same business or occupation within a specified locality for a limited period is enforcible by injunction.

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## DRAKE v. SIEBOLD.

(30 N. Y. Supp. 697, 1894.)

**Contract; Illegality; Referee; Practice; Amendments.**

D and S entered into a contract whereby D agreed to sell and deliver a quantity of coal to S, who agreed to take and pay for the same at certain named prices, subject to change in price by circulars issued thereafter. S having refused to proceed with part of the contract, was sued by D to recover damages for the breach. It was shown that the circulars referred to in said contract were issued at the instance of the Rochester Coal Exchange; that the sole purpose of this Exchange was to establish uniform retail prices at which coal shall be sold within a certain territory, and to prevent competition; that such prices were actually fixed; that members were subject to fine in case they did not keep up such prices, and that D was a member of this Exchange. The case was tried before a referee, on whose report the complaint was dismissed. On appeal the judgment was reversed, the court holding that:

(1) A contract entered into with a view to carrying out any of the purposes of an illegal combination is void, and unenforcible;

(2) Where lawful acts, unconnected with any illegality, are done under a contract void as against public policy, such acts may constitute the consideration for an implied contract capable of enforcement;

(3) At the hearing of the case a referee has no power to allow, against objection, an amendment which introduces an entirely new defense or cause of action; and

(4) Where plaintiff relies on a contract, valid on its face, in order that the defendant may avail himself of any illegality in the contract, he must plead such illegality specially.

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## DUEBER WATCH-CASE MFG. CO. v. E. HOWARD WATCH & CLOCK CO.

(66 Fed. 637, U. S. C. C. A., N. Y. 1895.)

### Pleading.

The action in this case was for damages against some twenty defendants under section 7 of the Sherman anti-trust act. The vital portion of the complaint charged the defendants with: (1) ratifying an agreement between themselves that they would maintain an arbitrary fixed price to the public for all the goods manufactured by them; (2) maintaining an arbitrary price and fixing the same for all goods manufactured by them; (3) continuing an agreement that they would not thereafter sell any goods manufactured by them to any person, firm, association or corporation whatsoever who should buy or sell any goods manufactured by the plaintiff; and (4) serving notices of such ratification and continuance of the three agreements upon all those persons who were former dealers in plaintiff's goods. The lower court sustained a demurrer to the complaint without rendering an opinion. In affirming this judgment, it was held that:

The complaint must charge specifically that the commerce sought to be restrained or monopolized is interstate or international.

NOTE.

This is the only point upon which there is an agreement by a majority of the court.

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## DUNBAR et al. v. AMERICAN TELEPHONE & TELEGRAPH CO. et al.

(39 Chi. Leg. N. 175, 224 Ill. 9, 79 N. E. 423, 1906.)

**Corporate Stock Ownership; Restraint of Trade; Foreign Corporations; Contracts, Rescission; Pleading.**

The American Telephone & Telegraph Company, a New York corporation, having succeeded to the business of the American Bell Telephone Company, operated a large system of telephone and telegraph lines in the United States, owned a large amount of stock in numerous subsidiary telephone companies, and with the Western Electric Company, an Illinois corporation, of which the American Company owned sixty per cent of the capital stock, constituted the "Bell Telephone Monopoly." The Kellogg Switchboard & Supply Company, an Illinois corporation, manufactured and sold all kinds of telephone and telegraph instruments and appliances, and was one of the strongest competitors of the Western Electric Company engaged in a like branch of business. To remove the Kellogg Company as a competitor, the American Company, through B, acquired two-thirds of its capital stock. Whereupon a minority of the stockholders of the Kellogg Company, in 1903, filed a bill against the American Company, the Western Electric Company, and various other parties, in substance alleging that, by the acquisition of two-thirds of the stock of the Kellogg Company the American Company caused the election of a board of directors which was to manage the Kellogg Company in the interest of the American Company and its stockholders; that after the American Company obtained control of the Kellogg Company it would be used as an independent company and its business capacity and efficiency increased until a certain other rival was destroyed, when it would be dissolved; and that such use of the Kellogg Company would result in loss to its stockholders. The bill prayed for an injunction to restrain the voting and a further

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sale of certain stock, for an election of a new board of directors and for the annulment of the sale of said stock. One of the stockholders from whom some of said stock was purchased, answered and filed a cross-bill, praying for the annulment of said sale on account of fraud. Upon demurrers to both bill and cross-bill, the demurrers were sustained and the bill dismissed for want of equity. The appellate court affirmed the decree. On appeal to the supreme court that portion of the decree which dismissed the bill was reversed; the portion of the decree dismissing the cross-bill was affirmed, the court holding that:

(1) The purchase by one corporation, in its name or through another, of the majority of the capital stock of a competing company, for the purpose of controlling the latter and thereby preventing competition, is against public policy, and is absolutely void; (224 Ill. 25)

(2) The tendency of a contract or transaction toward monopoly or restraint of trade is sufficient to invalidate either; (p. 23)

(3) A foreign corporation has no greater powers than a domestic company and is subject to the same rules and regulations; (p. 24)

(4) Where a corporation acquires the majority of the stock of another corporation, its officers, directors or others acting in its interest may be enjoined from exercising voting power that the majority of stock confers, when the two corporations have the same field of action and operation, when the profits of one may be advanced by lessening those of the other, and when their interests are conflicting as to expenditures and division of earnings; (p. 30)

(5) "A court of equity will look through all devices to discover and afford relief against the real situation;" (p. 25)

(6) A party seeking to rescind a contract of sale for fraud on the part of the purchaser, must, as a condition precedent, offer to restore the purchaser to the same position he was in before the sale was made; (p. 33) and

(7) A general demurrer admits all the material facts well pleaded. (p. 22)

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## ELLERMAN v. CHICAGO JUNCTION RAILWAYS AND UNION STOCK-YARDS CO. et al.

(49 N. J. Eq. 217, 23 Atl. 287, 1891.)

**Corporations, Powers, Ultra Vires; Contracts; Restraint of Trade; Pleas.**

By Illinois special Act of February 13, 1865, the Union Stockyards and Transit Co. of Chicago (hereinafter referred to as the "Transit Co.") was formed to construct and maintain a general union stockyard for cattle and live stock, with power to erect buildings and hotels and construct a railway, etc., forbidding all exclusive contracts for the transportation of cattle. Originally the capital stock of the Transit Co. was $1,000,000; afterwards, and before 1890, its capital stock was increased to $13,200,000, divided into 132,000 shares of $100 each. The Chicago Junction Railways and Union Stockyards Co. (hereinafter referred to as the "Junction Co.") was a New Jersey corporation organized in 1890 with power to purchase, pledge, transfer or otherwise deal in shares of stocks and bonds of the Transit Co., to purchase, hold and dispose of any kind of securities of any person or corporation, and to lease, sell and convey real or personal property of every nature. The authorized capital stock of this company was $13,000,000, divided into 130,000 shares at $100 each. In 1890, the Junction Co. purchased 129,770 shares of the capital stock of the Transit Co. for the sum of $22,587,283.90, of which $6,500,000 was paid with the bonds of the Junction Co. and the balance in cash. The principal business of the Transit Co. was done with certain owners of slaughtering, packing and canning establishments in the city of Chicago, whose establishments were situated around and about said yards. Among these were

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the plants of Armour & Co., Nelson Morris & Co. and Swift & Co. (hereinafter called the "packers") who owned and controlled the Central Stockyards in Packingtown, adjacent to the yards of the Transit Co. The combined business of these packers represented from fifty-five to sixty per cent of the whole revenue derived by the Transit Co. from yardage and charges. Claiming these charges to be illegal, said packers demanded that said Transit Co. permit them to use its railroad tracks for the transportation of their cattle to the Central stockyards without paying such charges, and, on being refused, commenced several suits in equity against the Transit Co. to enforce such demand. The packers also purchased 4,000 acres of land in Tolleston, Ind., within twenty-five miles of Chicago, for the location of general stockyards for cattle and live stock and for the purpose of removing their entire slaughtering, packing and canning establishments from Packingtown to Tolleston and inducing other slaughtering, packing and canning establishments to do likewise. As part of this scheme the Tolleston Stockyards Co. was organized under the laws of New Jersey with a capital stock of $1,000,000. Thus being confronted with the several suits brought by the packers to enforce certain duties claimed to be due them from the Transit Co. as a common carrier, which, if successful, would have forced it to contribute the use of its transportation facilities to the carrying on of a rival establishment, the threatened withdrawal of business representing over $850,000 of annual profit, and the possibility of adverse state and municipal legislation against the business of the Transit Co. and packers, the Transit and Junction companies, together with said packers, entered into an agreement whereby the packers agreed to continue in business for fifteen years at Chicago, to deal exclusively with the Transit Co. at its stockyards during that period, to abandon all claims in said court proceedings, not to engage directly or indirectly within the limits

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of Chicago or within 200 miles therefrom in the business of general or private stockyards, not to permit any portion of 3,000 acres at Tolleston to be used for stockyards or slaughtering, canning or packing-house purposes, and not to sell said land or any portion thereof without such restriction. The Junction Co. agreed to purchase for a consideration of $250,000 the Central stockyards, to be conveyed to the Transit Co., and all of the stock of the Tolleston Co. at par, and to pay to the packers $750,000 in cash or stock of the Tolleston Co. and guarantee the bonds of this company to the amount of $2,000,000. Thereupon a minority stockholder of the Junction Co., on behalf of himself and others similarly situated, instituted a proceeding in equity to enjoin the execution of said contract, claiming it to be *ultra vires* the corporation. After answers were made and a hearing had, the bill was dismissed, the court holding that:

(1) When the powers of directors of a corporation are without limitation or restraint, questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate and of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, and if these acts are within the powers of the corporation and are done in good faith, they cannot be questioned by stockholders in judicial proceedings; (49 N. J. Eq. 232)

(2) The consideration of a contract entered into on behalf of a corporation, if valuable, and not so inadequate as to impute fraud, is within the discretion of the board of directors and cannot be inquired into in a stockholders' proceeding; (p. 236)

(3) Where a contract recites that the parties entered into the covenants on *all* the terms and conditions specified in the agreement, the consideration of such a contract is an entirety and not severable; (p. 235)

(4) The private valuation put upon property by all of

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the parties in interest, when not made in fraud of creditors and not to the public's prejudice, will not be disturbed; (p. 247)

(5) All contracts of a corporation which are not contrary to the express provisions of its charter or the general law are presumed to be within its powers, and the burden is upon those who seek to invalidate them to show the elements which render them *ultra vires;* (p. 237)

(6) A statement of a power "to do any and all acts and things," etc., intended to confer authority upon a corporation, is indefinite and without effect as an object of incorporation, because, first, so far as any authorized acts are concerned, the company would possess the right to do them without such statement, and, second, it could confer no other powers because the law requiring the objects to be named must mean that they should at least be indicated; (pp. 239, 240)

(7) The phrase "necessary to the exercise" in sec. 3 of the New Jersey Corporation Act does not mean indispensable power, but all means suitable and proper to accomplish the object of incorporation; (p. 241)

(8) When the action of a corporation is challenged by the state, the state may insist upon the corporation's showing a clear warrant for its action, but when corporate action is questioned in a suit by individuals, the application of the doctrine of *ultra vires* is not so rigid and yields not only to necessity, but to transactions incidental to prescribed powers; (p. 242)

(9) What constitutes a corporation's incidental powers is a question of fact, depending in each case upon all the facts and circumstances; (p. 243)

(10) An accommodation guarantee by a corporation is *ultra vires* and void, and constitutes a fraud upon its stockholders; (p. 248)

(11) A corporation having power to issue bonds has the power to guarantee payment of a creditor's bonds *pro tanto* in satisfaction of debt; (p. 247)

(12) One of the incidental powers of a corporation is the

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power to enter into a compromise and the payment of a claim imposed by the agents of the corporation in good faith, for the purpose of avoiding litigation; (p. 250)

(13) A corporation has the incidental power to buy off opposition and thereby acquire property useful to its operations; (p. 252)

(14) A contract which operates simply to prevent a party from engaging or competing in the same business is not in general restraint of trade and against public policy; (p. 253)

(15) Contracts imposing unreasonable restraint upon the exercise of a business, trade or profession are void, but contracts in reasonable restraint are valid; (p. 255)

(16) Whether the restraint is reasonable is determined by whether it is such as is necessary to afford a fair protection to the interest of the party in whose favor it operates, and is not so large as to interfere with the interests of the public; (p. 256)

(17) An agreement, in consideration of the purchase of a business and its good will, not to compete with the purchaser for a definite time and within a limited space, is reasonable and not unlawful; (p. 256)

(18) Where the business extends throughout the United states, a covenant not to engage in it within a certain place or within two hundred miles thereof is reasonable; (p. 256) and

(19) The invalidity of a corporation's contract because in restraint of trade may be raised collaterally as a question of *ultra vires*, on the ground that the directors have no power to use the funds of the corporation in performing an agreement which can not be enforced against the other parties. (p. 255)

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## ELLIS v. INMAN, POULSEN & CO. et al.

(131 Fed. 182, reversing 124 Fed. 956, U. S. C. C. A., Ore. 1904.)

### Construction; Combinations.

The foregoing case was decided on demurrer to a complaint alleging that the plaintiff was a contractor and builder doing business in Portland, Oregon; that in such business he purchased large quantities of rough lumber from mills located at Vancouver, Washington, which was seven miles from Portland, but that such mills did not manufacture seasoned or kiln-dried lumber; that defendants, who comprised all the manufacturers and dealers in Portland, and were the only manufacturers of seasoned or kiln-dried lumber, as well as rough lumber, combined to fix exorbitant prices on all lumber sold by them, and to compel all consumers in Portland to pay such prices by refusing to sell any finished lumber at any price to those consumers who bought lumber of any kind from other dealers outside the state, except on condition that a consumer pay the defendants the difference between the price he paid for lumber so bought from others and the price charged therefor by defendants and promise to buy all his lumber thereafter from the defendants; and that the purpose and effect of such combination was to prevent plaintiff and other consumers from buying lumber at Washington mills, and to obtain a monopoly of trade in Portland at unreasonable and exorbitant prices. The lower court sustained the demurrer, but this judgment was reversed on appeal, the court holding that:

(1) A combination of all local manufacturers of a commodity which, in addition to restraining and controlling the

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trade locally, also prevents competition from outside of the state is within Federal anti-trust laws; and

(2) A combination is unlawful as against Federal anti-trust laws when it tends *directly* to appreciably restrain interstate commerce, regardless of the proportion the resulting restraint of interstate commerce bears to other effects or results of the combination, the reasonableness or unreasonableness of the restraint of trade, and its effect upon prices of the article which it attempts to restrain or monopolize.

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## ERTZ v. PRODUCE EXCHANGE.

(82 Minn. 173, 84 N. W. 743, 51 L. R. A. 825, 1901.)

### Combinations; Incorporation; Conspiracy.

E was a member of the Produce Exchange Company, a Minnesota corporation. The by-laws of this company prohibited its members, under penalty, from selling their produce to any person, firm or corporation not a member of said company, and to such members as forfeited their membership, except at certain prices and conditions. E violated these by-laws and was fined and suspended from membership for non-payment of such fine. Being unable to purchase from, or sell to, any of the members of said company, he brought an action under 1899 anti-trust law to recover damages for an alleged combination and conspiracy to ruin his business. The trial court directed a verdict for the defendants and entered judgment. On appeal, this judgment was reversed, the court holding that:

(1) A corporation which discriminates between prices of goods to be charged to members and those to be charged to non-members, enforces such discrimination by penalties, and fixes an arbitrary mode of settlement for goods purchased on credit, is within section 1, anti-trust law of 1899;

(2) A conspiracy or an unlawful combination may exist between members of a corporation whose business is conducted in a prohibitive manner;

(3) Where an act does not give affirmatively a right of action to a party injured by an unlawful combination, redress will be granted to such party upon the general doctrine that one who commits a criminal act which results to the injury of another must respond in damages to the party injured; and

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(4) A party who has participated with others in an unlawful conspiracy or combination, on severing connection with his co-conspirators, may recover damages for any wrong he has suffered through their acts done after his reformation.

NOTE.

Points one (1) and two (2) do not appear in the opinion of the case, but were necessarily involved in its decision.



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## EXPORT LUMBER CO. v. SOUTH BROOKLYN SAW-MILL CO.

(67 N. Y. Supp. 626, 1900.)

**Trade Restraint; Contracts.**

An individual, two copartnerships and three corporations, dealing in lumber contracted to conduct their export business, exclusive of their general lumber business, jointly, by having one of their number purchase from each of them their export lumber and ship it in his name without disclosing the agency; to account together and divide the profits and losses. It appeared that this contract was entered into solely for the purpose of economy and convenience; and that it did not appear that these parties were producers of lumber or that the supply of lumber was in any way controlled so as to affect prices. In an action on this contract a demurrer to the complaint was overruled. In affirming this judgment it was held that:

(1) An arrangement between several, but not all, of the dealers in a locality, whereby a part of their business is to be conducted by one of them, for the purpose of economy and convenience, when neither the supply nor prices of the commodity dealt in is in any way affected, is not in restraint of trade; and

(2) Unless an agreement is incapable of a construction upholding its validity, it will not be adjudged illegal.

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## FAULDS v. YATES.

(57 Ill. 416, 11 Am. Rep. 24, 1870.)

**Combinations; Stockholders' Control; Partnership; Parties.**

F, Y and B, individuals, entered into a partnership agreement whereby F's capital stock in a coal mining company was valued at a certain amount and two-thirds of it sold to Y and B, F agreeing to superintend the mining operations, and Y and B were to provide proper salesmen and finance the enterprise, F, Y and B to share equally in the profits of the business. It was also agreed that they would elect directors and determine upon the appointment of officers of the mining company; that in case of disagreement, they would ballot among themselves for directors and officers; that a majority should rule; and that their vote should be cast as a unit so as to control the election. Upon F's breach of this contract, suit was brought against him for a division of real estate purchased by him under said contract for the benefit of said parties, and for an accounting. He contended, among other things, that the contract was against public policy and void. A decree in favor of complainant having been entered, F appealed. The decree was in part modified, the court holding that:

(1) Owners of a majority shares of stock of a corporation may, in advance, agree among themselves to secure proper management and control of their corporation by voting as a unit for the election of directors and officers of such corporation;

(2) In equity, for purposes of distribution, partnership real estate is treated the same as partnership funds;

(3) A partner holding partnership real estate in his own

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name is considered as a trustee of the partnership and is accountable as such to his partners;

(4) When a conveyance of land is asked under an agreement, it will be granted only upon the specific terms of such agreement; and

(5) In a controversy between owners of property of a corporation, which in no way affects its interest, the corporation is neither a necessary nor proper party

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## FECHTELER v. PALM BROS. & CO.

(133 Fed. 462, U. S. C. C. A., Ohio, 1904.)

**Partnership; Trade Restraint; Equity; Accounting.**

A New York copartnership, engaged in the manufacture and sale of silk ornaments, etc., contracted with an Ohio corporation, doing a like business, to supply upon each other's order for twelve years certain goods at cost; the partnership to receive in addition to the cost of said goods sixty-four per cent of the total yearly gross profits realized by the Ohio corporation out of its entire business transactions, including its branch houses; and the corporation to receive, in addition to said cost of goods, thirty-six per cent of the total yearly gross profits realized by the partnership, including a like percentage earned by certain of their branch establishments. The Ohio corporation endeavored to escape liability under said contract by and through the organization and operation of subsidiary companies. Whereupon the New York copartnership exhibited their bill for an accounting. A demurrer to the bill as amended having been sustained, the bill was dismissed. On appeal from the judgment of dismissal, the lower court was reversed, the reviewing court holding that:

(1) A contract of a corporation giving another an interest in its profits is not *ultra vires* when stockholders of the corporation are not thereby deprived of their power and duty to manage its corporate affairs, and when it does not subject the corporation to the dominion incident to the affairs of a copartnership; (p. 466)

(2) As a test of partnership, participation in the profits, as profits, is strong evidence of a partnership, and enough,

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unless explained by other circumstances showing a different relation; (p. 467)

(3) A contract between two mercantile establishments giving each an interest in the gross profits of the other is not in restraint of trade, unless the contracting parties are the only ones engaged in the particular business; (p. 471)

(4) "Where it is evident that, under the machinery of a court of law, great difficulties would attend the statement of an account, courts of equity have a jurisdiction concurrent with courts of law;" (p. 464)

(5) For purposes of accounting, performance of a contract is sufficiently alleged by stating that "all the provisions of said contract by complainants to be performed . . . had by them been performed, and performance thereof accepted by defendant;" (p. 464) and

(6) A bill praying for an accounting, which also contains a prayer for general relief, is sufficient. (p. 465)

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## FERD. HEIM BREWING CO. v. BELINDER.

(97 Mo. App. 64, 71 N. W. 691, 1903.)

### Combination; Against Debtors.

The Brewing Company sued one of its customers to recover the price of beer. At the trial it was proved that the plaintiff and all other brewers in Kansas City had an understanding and agreement whereby one indebted to any of the contracting parties was prevented from purchasing beer from any of them until he settled his debt. In the trial court the plaintiff had judgment, but on appeal the judgment was reversed, the reviewing court holding that:

(1) An agreement between all of the dealers in a locality which prevents dealing with one who is indebted to any of them is against public policy, and void;

(2) The legality of a combination is ascertained by its character and purpose;

(3) Whether a combination is lawful or unlawful does not depend upon the intention of the parties entering into it;

(4) What one may do alone is no test as to what he can or cannot do in combination with others; and

(5) Under section 8970, Rev. St. 1899, it is a good defense to an action for the price of a commodity to show that the dealer was at the time of the sale a member of or a party to a combination which prevented its members from dealing with parties who were indebted to any of the members.

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## FIELD v. BARBER ASPHALT PAVING CO.

(24 Sup. Ct. Rep. 784, 194 U. S. 618, 48 L. ed. 1142, Mo. 1904.)

**Municipal Corporations; Assessment; Commerce.**

F, as owner of certain lands, filed a bill against the paving company seeking to avoid payment of taxes assessed against him for paving certain streets. He contended that the levy should be declared void for these reasons: (a) The act under which the tax was levied violated the fourteenth amendment to the constitution of the United States; (b) the paving in question was unnecessary, and the contract for the same was the result of undue and illegal influence on the part of the agents of the paving company exercised upon the board of aldermen; (c) the contracts for the paving required the same to be constructed of a specified asphalt, thereby cutting off competition with other kinds of asphalt suitable for street paving; (d) the proceedings and agreements by which such asphalt was designated in the resolutions, ordinances and rules for the construction of said pavements, were in violation of interstate commerce clause of the United States constitution; and (e) the said resolutions, ordinances and contracts, and the action of the paving company in securing the same, were in violation of the Federal anti-trust act of July 2, 1890. The trial court ruled against the Federal questions, but held some of the paving to be unnecessary. In partly upholding the rulings of the trial court and reversing it on the question of necessity of the paving involved, it was held that:

(1) Except in cases of fraud or an arbitrary use of power, interested property owners in a municipality are bound by the acts of its governing body;

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(2) After full performance of a contract it will not be set aside in the absence of proof of fraud or corruption;

(3) A state may, in the exercise of its police power, make regulations which indirectly affect interstate commerce;

(4) A contract which has a remote and indirect bearing upon commerce between states is not within the Sherman anti-trust law;

(5) It is not an arbitrary and unreasonable discrimination between resident and non-resident property owners for a legislature to give a majority of resident property owners the right to protest against improvements and to fail to give a like right to non-resident owners, when there is no discrimination in the property owners' taxation of the improvement, such discrimination being a reasonable classification of the subject by the legislature and satisfies the fourteenth amendment of the United States constitution; and

(6) Where a Federal court's jurisdiction is invoked in a case on constitutional grounds, the case is appealable under section 5 of the Act of March 3, 1891, at the instance of either party, directly to the supreme court, and not to the circuit court of appeals.

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## FIELD CORDAGE CO. v. NATIONAL CORDAGE CO.

(6 Ohio Cir. Ct. R. 615, 1892.)

**Restraint of Trade, Contracts; Evidence; Appeal and Error.**

About 1890, the National Cordage Co., a New Jersey corporation, being the owner of a large number of mills and engaged in the manufacture of binder twine, entered upon a comprehensive scheme to rid itself of competitors. To carry out this purpose, said company secured from each competitor a "dead lease" of his machinery, exclusive of buildings or premises, in consideration of a large sum of money payable as rental. Under this lease the possession of the machinery remained with the lessor, who was to operate the plant at a limited capacity or shut it down. One of these leases, for a five years' term, was obtained from the Field Cordage Co., an Ohio corporation. The lessee having failed to pay to the lessor a certain instalment of rent, the latter brought an action to recover the same. The defendant answered, admitting the execution of the lease, but pleaded, principally, failure of consideration. A jury was waived and the court found for the defendant upon the ground that the lease was a part of an unlawful scheme or combination in restraint of trade. Judgment having been rendered on said verdict, the plaintiff appealed. In affirming this judgment, it was held that:

(1) Every contract whose only purpose is to place a restraint upon trade, however narrow may be the field of its operation, is void as against public policy; (p. 621)

(2) For the purpose of determining the real object of a contract or transaction claimed to be illegal because in restraint of trade, it is permissible to show the negotiations

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between the parties leading up to the execution of the contract, the execution of contemporaneous agreements between the parties and third persons, and subsequent correspondence and dealings of all the parties with reference to the contract, regardless of the issues joined between the parties; (pp. 624, 625) and

(3) "When a cause is tried to the court and its finding is supported by competent evidence, the judgment will not be reversed for the admission of incompetent evidence whose exclusion could not have changed the result of the trial." (syl. 3)

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## FINCK v. SCHNEIDER GRANITE CO.

(86 S. W. 213, Mo. 1905.)

### Combinations; Producers and Dealer.

Anticipating an unusual demand for crushed granite, and desiring to make the most out of it, three corporations and two partnerships, which, as a combination, controlled nearly the entire sale of crushed granite in Missouri and neighboring markets, caused the organization, under the laws of Missouri, of a selling corporation under the name of St. Louis Crushed Granite Company. The incorporators of this company were all connected with the five concerns mentioned. The capital stock of the selling company was nominal and was subscribed for and held by said persons as trustees for their establishments. Immediately after the selling company was organized, it entered into separate contracts with each of the five producers. Under these contracts each producer agreed to sell and furnish for five years its entire output of crushed stone exclusively to the selling company at certain prices, and in case it sold crushed stone to other parties than those who were in the arrangement, it agreed to pay to the selling company a certain amount as a penalty. The selling company did merely a routine business, keeping books in which sales were recorded, receiving proceeds from sales, and dividing profits amongst the companies which caused its organization in proportion to stock held by each of them. On the withdrawal from the agreement of one of these concerns, it was sued to recover said penalty. The defendant had judgment in the trial court. On appeal, the judgment was affirmed, the court holding that:

(1) A contract between a selling company and producers for the sale of their entire product at uniform prices, the

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selling company having been first organized by such producers for this purpose, and both the selling company and contract being part of a scheme to control prices, is against public policy and void;

(2) The legality of a combination or contract at common law is tested by the fair and just protection either of them affords to the parties and its effect upon the interests of the public;

(3) Where a combination or agreement is lawful prior to the passage of an act, but is subsequently declared unlawful by the legislature under its police power, the continuation of the combination, or the performance of acts under such agreement after the act has taken effect, constitutes a violation of such act;

(4) A corporation is acting beyond its lawful powers when it aids the carrying out of an unlawful conspiracy; and

(5) Vested rights are not exempt from the lawful exercise of a state's police power.

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## FOOT v. BUCHANAN.

(113 Fed. 156, U. S. C. C., Miss. 1902.)

**Witnesses; Self-Incrimination; Immunity.**

F was subpoenaed, sworn and examined before a grand jury in relation to violations of the Sherman Act. Several questions were asked of him relating to the fixing of prices and limiting of production of cotton seed and its products through a combination. F refused to answer because in answering he would incriminate himself and place the government in possession of information as to details of the alleged combine and agreement and the names of parties and witnesses which might supply the means of convicting him of the same offense. On the grand jury's report the witness was brought before the district court, where he repeated his reasons for declining to answer. He was then assured by the court that no information given by him in answer to the questions would or could be used against him in any prosecution in any United States court. But he still declined to answer. The court thereupon ordered that F be returned to the grand jury and answer the questions. On refusal to obey the order, F was committed to jail until he should answer said questions or be otherwise discharged by due course of law. At the time, F was under indictment for a similar offense to the one under consideration by the grand jury. Being in custody of the United States marshal, F filed a petition for writ of *habeas corpus*. In discharging the petitioner, it was held that:

(1) Under the common law, a witness could not be compelled to answer any question the reply to which would supply evidence by which he could be convicted of a criminal offense; (p. 158)

(2) By the fifth amendment to the Federal constitution,

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no person can be compelled in any criminal case to be a witness against himself; (p. 158)

(3) Witnesses or parties cannot be required under sec. 860 Rev. St. (U. S.) to incriminate themselves, because said section does not afford complete immunity; (p. 160)

(4) Since the Act of February 11, 1893 (27 Stat. at L. 443), parties or witnesses in cases or proceedings brought under the Act of February 4, 1887 (24 Stat. at L. 379), relating to commerce and amendments thereto, may be required to answer questions tending to incriminate them, but the Act of February 11, 1893, has no application to actions arising under the Sherman Act; (p. 160)

(5) Whether the answer of a witness or a party to a question will reasonably tend to self-incrimination or will furnish an element or link in the chain of evidence necessary to convict him is for the judge to decide, the witness or party cannot avoid answering questions upon his mere statement that his answers to them will tend to self-incrimination; (p. 160)

(6) In deciding whether or not the witness is entitled to the privilege of silence, the court may look at all of the circumstances of the case and determine whether or not there is reasonable ground to apprehend danger to the witness from his being compelled to testify, and if the witness is in such danger, great latitude should then be allowed to him in judging for himself of the effect of any particular question, because a question which might appear at first a very slight and innocent one might, by establishing a link in a chain of evidence, become the means of convicting the witness; (pp. 160, 161)

(7) A witness cannot be required to waive his constitutional privilege of silence upon the assurance by the court that no information given by him would or could be used against him in any prosecution in any court of the United States; (p. 161) and

(8) Where there is a series of questions, the examiner cannot pick out one and say if that be put the answer will not incriminate him, but where an answer to a question would be one step toward self-incrimination, the witness should not be compelled to answer. (p. 161)

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## FORD v. CHICAGO MILK SHIPPERS' ASSOCIATION.

(155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298, 1895.)

**Combinations; Corporation and its Stockholders; Contracts; Defenses.**

Chicago Milk Shippers' Association was organized in February, 1891, with a capital stock of $100,000, divided into $10 shares, the sale and transfer of which shares were restricted to producers and shippers of milk. The board of directors of this association consisted of nineteen members, who selected an advisory committee of five members. These five members, together with the president of the association, constituted the managing board. As such board it could and did establish uniform prices for milk throughout the city of Chicago. Milk dealers were required to give security that the prices thus established would be maintained by them. The association was operated exclusively within the limits of Chicago, in which vicinity it had a membership of one thousand five hundred dealers. In April, 1891, and before he was permitted to purchase milk from any of the members of the association, F, together with a surety, entered into a contract of guaranty for the payment of milk subsequently to be purchased by him. Under this guaranty and arrangement between the members of the association in October, 1891, a quantity of milk was sold to F. On his refusal to pay for the same an action was brought against him for said milk. He defended the action on the ground that at the time of furnishing said milk to him plaintiff was a party to an unlawful combination, which fixed prices and regulated the amount and the quantity of milk sold in Chicago. The case was tried by the court without a jury and the

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judgment. On appeal from this judgment to the appellate court, the trial court was reversed and judgment there entered against the defendant. On a further appeal the appellate court was reversed and the judgment of the trial court was affirmed, the supreme court holding that:

(1) Section 6 of 1891 anti-trust law, providing that a purchaser of an article or commodity from an individual or company transacting business contrary to the provision of this act shall not be liable for the purchase price of such article or commodity, is constitutional;

(2) Stockholders and their corporation may be guilty of a charge of being an illegal combination in restraint of trade when, in connection with the corporation, prices are controlled and production of an article of merchandise is limited by such combination;

(3) "Where, in the organization of the corporate body or the control exercised by the stockholders in determining the agencies selected for managing its business, the business as thus conducted, managed and controlled is against public policy or in contravention of a statute of the state, such acts of the corporate body and of the individual shareholders are the combined acts of all;"

(4) The fact that a person is a stockholder in a corporation does not prevent his entering into contract relations with such corporation, nor does this fact change his liability incurred under a contract with it;

(5) Under the police power of a state a corporation operated as an illegal combination is amenable to legislative control, although such corporation was organized prior to the enactment of such regulation;

(6) Rights and liabilities arising under unilateral contracts are governed by laws in force at the time of the performance of such contracts and not the date of their execution; and

(7) A contract made in violation of a public statute is unenforcible even when executed.



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## NOTE.

The Chicago Milk Shippers' Association was organized to carry out a previously agreed plan, which was clearly violative of a statute of the state. There was no actual consolidation of all the interests of the members or shareholders of the association. The scheme to fix uniform prices and control production was attempted to be covered by the incorporation. The corporation had no other existence than to carry out this illegal scheme. Incorporation was resorted to merely as a cover for the illegal combination, and nothing else.

The decision on point seven (7) is unsatisfactory because there was and now is in Illinois a statute declaring void all contracts made in contravention of its provisions.

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## FORT WORTH & DENVER CITY RY. CO. v. STATE.

(87 S. W. 336, 88 S. W. 370, 70 L. R. A. 950, Tex. 1905.)

### Contracts; Exclusive Rights.

In February, 1899, the railroad company, a Texas corporation, entered into a written agreement with the Pullman Palace Car Company, an Illinois corporation, whereby, for fifteen years from that date, the car company agreed to furnish properly equipped sleeping cars to the railway company as it might require, and to make such charges to passengers traveling on said railway company's lines for their use as were customarily charged on competing lines of railroad for like services. The railroad company agreed to haul and use said cars in connection with its passenger trains. During the continuance of the agreement the car company was given the exclusive right to furnish and operate said cars on the lines of the railroad company. Predicated on this contract, an action was brought by the state against said corporations to recover penalties for the alleged violation of anti-trust laws of 1899 and 1903. The trial court, without the intervention of a jury, decided that by entering into said contract there was no violation of the anti-trust act of 1899, but that there was a violation of the act of 1903, and gave judgment for the state in the sum of $18,550. On appeal to the court of civil appeals, that court certified certain questions to the supreme court. In answering these questions the supreme court held that:

(1) A contract between a railroad corporation and a car company, relating to transportation, which does not fix a standard of prices or charges for furnishing and using cars,

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but merely provides that the car company shall demand and receive from passengers traveling on the railroad company's lines only such charges as are made by the car company on competing lines for like services, is not within anti-trust act of 1903;

(2) Granting by one party to another, for a term of years, the exclusive right to perform certain services relating to his business, when otherwise legal, is not such restriction upon the free pursuit of any business authorized or permitted by law as is prohibited by the anti-trust act of 1903, because no one has an absolute right in or to another's business without his consent;

(3) An agreement by a railroad company to haul cars of a car company, the latter retaining the property in such cars, and when the agreement in no way tends to affect or lessen competition with the railroad or car company's business, is not within section 2 of anti-trust act of 1903;

(4) When an agreement is valid under the anti-trust law of 1903, it is also valid under the act of 1899, because the latter act is not as broad as the former; and

(5) "Where an action is brought to recover a penalty allowed by the anti-trust statutes of Texas, no right of the state to the penalties can be based on the ground that the contract which was alleged to be in violation of the Texas statutes also created a monopoly at common law, or was in violation of the terms of the anti-trust statutes of the United States." (Syl. 2 in 88 S. W.)

NOTE.

The last two points were decided by the court of civil appeals when the case came before it from the supreme court with the answers to the propositions certified to it.

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## FOSS et al. v. CUMMINGS et al.

(149 Ill. 353, 36 N. E. 553, 1894.)

### Restraint of Trade, Contracts; Practice.

There being in 1888, a small amount of cash corn in the country, in order to raise its price a number of persons engaged in the purchase and sale of corn in Illinois and adjoining states formed a combination to buy up cash corn and to withdraw the same until there was an advance in prices. For this purpose F was employed to bring into the combination certain other parties and to purchase May options. Also, as part of said scheme, a certain firm in which F was interested was employed, under power of attorney, to sell on commission all grain to be acquired under said combination. In an action of assumpsit brought by Foss et al., the plaintiffs declared upon common counts. The defendants pleaded the general issue, non-joinder of defendants, and set-off. A jury was waived and the case tried by the court, who rendered judgment for the plaintiffs. On appeal to the appellate court, this judgment was reversed. Upon a re-trial, again by the court without a jury, judgment was rendered for the defendants, which judgment was affirmed on appeal to the appellate court. In affirming this judgment by the supreme court, it was held that:

(1) Any agreement, understanding, or combination to advance and enhance the price of a commodity in general use above the market price is in restraint of trade and void, although the restraint is only partial; (149 Ill. 359, 360)

(2) Under sec. 130 Criminal Code (Illinois), all contracts made for the purpose of cornering the market in grain or other commodity are absolutely void; (p. 359)

(3) Illegal contracts are unenforcible; (p. 359) and

(4) When a proposition of law submitted by one of the parties stating the law correctly is given to the jury, propositions submitted on behalf of the other party, if of doubtful correctness, may be properly refused. (p. 358)

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## FOWLE et al. v. PARK et al.

(131 U. S. 88, 33 L. ed. 67, Ohio, 1889.)

**Trade Secrets; Sales, Vendor's Covenant, Construction.**

In 1844, Lewis Williams, having discovered and compounded a certain medicinal preparation, made two transfers of the formula for its manufacture and sale, one, May first, to B. F. Sanford and John D. Park, and the other, May 20th, to Isaac Butts, for a valuable consideration, with the sole and exclusive right to manufacture and sell said preparation in certain named states, each conveyance covering different territory, and confining the vendee or vendees to the manufacture and sale within his or their own territory. A year afterwards, Butts sold and assigned all of his right, title and interest in and to said formula to Seth W. Fowle, who for himself, his representatives and assigns agreed, as part of the consideration, to sell said preparation only within the territory covered by Williams' sale to Butts, and to sell at certain prices. Subsequently all the rights of Seth W. Fowle passed by purchase and descent to Seth A. and Horace S. Fowle. Prior to 1869 B. F. Sanford conveyed to John D. Park his interest in the second sale of said formula. In 1869, John D. Park sold and transferred all his right in and to said formula to Seth A. Fowle and Lucy A. S. Fowle, obligating himself and those claiming under him not to compete with the purchasers or their assigns in the manufacture or sale of said preparation within a described territory. In 1872 Lucy A. S. Fowle assigned her interest in said formula to said Seth A. and Horace S. Fowle. In a bill brought by the latter against J. D. Park and his partners, after setting forth the various sales, transfers and assignments, it was charged that

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Park's partners had derived their interests in said formula and its preparation since the execution of the contract of 1869, that they had knowledge of the contract of 1869 and its restrictions, and that for ten years each of the defendants failed to comply with the contract between Williams, Sanford, and Park by disregarding the territory within which they made their sales and the prices at which the preparation was sold. The bill prayed for an injunction and an accounting. The defendants answered by way of cross-bill, claiming the exclusive right to manufacture and sell said preparation in the territory assigned by Williams to Butts, and that they had the right to sell at less than certain prices. On a hearing the bill and cross-bill were dismissed. In reversing the lower court, it was held that:

(1) A trade secret or formula is a property right enabling its owner to claim relief against breaches of trust in respect thereto;

(2) "The policy of the law is to encourage useful discoveries by securing their fruits to those who make them;"

(3) Upon the sale of a secret process for the manufacture of a useful article it is not unlawful for the vendor to agree not to compete with the vendee within a certain territory during an unlimited period;

(4) A contract in restraint of trade is valid when it does not involve the public welfare and the restraint that contract imposes upon one of the parties is not greater than the protection to the other requires;

(5) The validity of a contract in restraint of trade should be tested by the reasonableness of the restraint under the particular circumstances of the case and the nature of the particular contract involved; and

(6) The mere fact that a contract in restraint of trade is unlimited as to the time the restraint is to operate does not render it invalid when the restraint is limited as to space and is necessary to the protection of the party in whose favor it is imposed.

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## FRANCIS v. TAYLOR.

(65 N. Y. Supp. 28, aff'd 65 N. Y. Supp. 1133, 1900.)

**Joint-Stock Companies; Absorption; Dissolution.**

This was an action by a stockholder of Wagner Palace-Car Company, an unincorporated joint-stock association, against the treasurer of said company and others. Pending the action, an injunction was sought to restrain a proposed transfer and dissolution of said company, which was consented to by about ninety-five per cent of its stockholders, under an arrangement whereby the Wagner Palace-Car Company was to transfer all of its property to and be absorbed by the Pullman Palace-Car Company. This motion was denied, the court holding that:

(1) Voluntary associations or copartnerships are governed by contracts under which they come into existence, and not by laws relating to corporations;

(2) A majority of stockholders in an unincorporated joint-stock association will be restrained at the instance of minority stockholders only when the wrong complained of is clearly established and is such as to raise the necessity for injunctive relief;

(3) Absorption by one concern of a competing firm, for the purpose of reducing administrative expenses and for greater effectiveness in management, is not necessarily injurious to the public, and is, therefore, not unlawful;

(4) In liquidation of an unincorporated joint-stock company a sale in bulk of its property may be made whenever the circumstances of the case are of a character to require it to be done;

(5) A stockholder in an unincorporated joint-stock company cannot be compelled to take shares of stock in a foreign corporation in payment of his interest in such company upon its dissolution; and

(6) Foreign laws are not judicially noticed.

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## FRANCIS T. SIMMONS & CO. v. TERRY.

(79 S. W. 1103, Tex. Civ. App., 1904.)

In this case a contract between a manufacturer and dealer for the exclusive handling by the latter of an article of merchandise manufactured by the former, during a limited period, and within a certain territory, was condemned as illegal under anti-trust law of 1899. This case was criticised in, and is overruled by, Norton v. W. H. Thomas & Sons Co., 91 S. W. 780, 1906.

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## FROELICH v. MUSICIANS' MUTUAL BENEFIT ASSOCIATION.

(93 Mo. App. 383, 1902.)

**Association; Trade Restraint; Public Policy.**

The Musicians' Mutual Benefit Association was a voluntary organization, having for its object the unity of instrumental musicians and the regulation of prices to be charged by its members for their services. Members were prohibited, under penalty, to accept or offer employment at less than the prices fixed by this association. They were also required, under like penalty, not to perform services with non-members. At a special meeting of the association at which F, one of its members, was not present, a resolution was adopted providing for a fine against any member who rode on a St. Louis street car line then involved in a strike. F, having incurred such fine, refused to pay it. This association then proceeded to expel him, when he filed a bill to restrain it and its officers from carrying out said object. The circuit court granted an injunction. This, however, was reversed on appeal and the bill dismissed, the reviewing court holding that:

(1) A voluntary association, having for its object the fixing of uniform prices at which its members shall perform their services, and which prevents members from offering or accepting employment at prices other than those established, is in restraint of trade, and against public policy;

(2) Membership in an illegal combination or association will not be protected by the courts; and

(3) A court of equity will prevent an unlawful or arbitrary suspension or expulsion of a member from a lawful, voluntary association only when a civil or pecuniary right is involved in a controversy between the member and such association.

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## FUQUA v. PABST BREWING CO.

(90 Tex. 298, 38 S. W. 29, 35 L. R. A. 241, Tex. 1896.)

**Contracts; Commerce; Appeal and Error.**

The Brewing Company in 1892 contracted with K to sell him on credit, during a certain period, a designated quality of beer. As part of this contract, the Brewing Company agreed not to sell or consign its beer to any other party within the vicinity where K was trahsacting business, and K agreed not to sell or be interested in any other beer than that manufactured by the Brewing Company. Performance of this contract on behalf of K was guaranteed by four individuals. Upon K's refusal to pay a certain balance due under said contract and guaranty, suit was brought upon the guaranty. The trial court rendered judgment against the guarantors, which judgment was affirmed by the court of civil appeals. On appeal to the supreme court, this judgment was reversed, the court holding that:

(1) A contract between a producer or manufacturer and a dealer, whereby the producer agrees to sell his or its manufactured product to the dealer in a certain vicinity, to the exclusion of any other, and the dealer agrees to be engaged solely in the sale of such commodity, is in restraint of trade and void;

(2) Where some of the provisions of a contract are unlawful, and some of the other provisions are lawful the illegal portion of such a contract destroys the entire contract;

(3) A contract which attempts to deal with property, which part of the time is interstate commerce and part of the time intrastate commerce, if illegal as to the latter, is also illegal as to the former;

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(4) When an article manufactured in one state is shipped to another, under a contract of *sale*, the title vesting in the purchaser, such article loses its interstate character and becomes subject to state regulation and control;

(5) Where a contract guaranteed is void, the guarantee is also voided;

(6) A general demurrer to a declaration upon a contract raises the question of validity of the contract; and

(7) Where contracts made in contravention of statute are by it declared void, a judgment rendered on such a contract should be set aside when the illegality of the contract appears on the face of the record, even in the absence of an assignment of error.

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## GAMEWELL FIRE ALARM TELEGRAPH CO. v. FIRE & POLICE TELEGRAPH CO.

(25 Ky. Law Rep. 1010, 76 S. W. 862, 1903.)

**Corporations; Nominal Existence; Stock Ownership Control; Competition; Creditors.**

Prior to 1894 the New Gaynor Electric Co., a Kentucky Corporation, was in competition in Kentucky with the Gamewell Fire Alarm Telegraph Co., a New York corporation. To remove this competition, the New York company caused the organization in 1894, under the laws of Kentucky, of the Fire & Police Telegraph Co., and also purchased all of the stock of the New Gaynor Electric Co. on behalf of the Fire & Police Telegraph Co. The New Gaynor Electric Co. was continued in business in pretended competition with the New York company and the Fire & Police Telegraph Co., and as a result created a large indebtedness. Subsequently the New Gaynor Electric Co. and the Fire & Police Telegraph Co. became insolvent. In 1900, as creditor and stockholder of the Fire & Police Telegraph Co., the Gamewell Fire Alarm Telegraph Co. brought an action for the purpose of having the New Gaynor Electric Co. and the Fire & Police Telegraph Co. declared insolvent, their affairs placed in the hands of a receiver, and their assets collected and paid to the creditors of the two corporations. A receiver was thereupon duly appointed. The Gamewell Fire Alarm Telegraph Co's claims were contested by creditors of the New Gaynor Electric Co. and the Fire & Police Telegraph Co. on the ground, among others, that the Gamewell Fire Alarm Telegraph Co., the Fire & Police Telegraph Co., and the Gamewell Fire Alarm Auxiliary Co., the latter a Maine corporation, were, at and during the time in which the indebtedness

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to the New York Co. had accrued, "a pool, trust, combine and confederation, for the purpose of regulating, controlling, increasing and fixing the price of electrical apparatus and appliances and fire alarms . . . and for the purpose of fixing, establishing and limiting the amount and quantity of such articles to be produced and manufactured, bought or sold," and that said claims arose in carrying out said illegal combinations and in furtherance of the same in violation of statute, and that said claimant, therefore, had no right to any of the assets of the Fire & Police Telegraph Co. or to the New Gaynor Electric Co., the assets being sufficient only to pay a small pro rata among the creditors of these two companies. The trial court gave judgment to the general creditors of the New Gaynor Electric Co. in the amount of their respective claims; to the creditors of the New Gaynor Electric Co., against the Fire & Police Telegraph Co. as stockholder in the New Gaynor Electric Co.; and to the ordinary creditors of the Fire & Police Telegraph Co., *including the Gamewell Fire Alarm Telegraph Co.*, upon their respective claims. The assets of the Fire & Police Telegraph Co. were to be distributed pro rata among all of its creditors, including those to whom it was liable as stockholder in the New Gaynor Electric Co., as well as to those to whom it was liable by reason of its ordinary transactions. Judgment was rendered in favor of all creditors against the Gamewell Fire Alarm Telegraph Co. for the amount of its statutory liability as stockholder in the Fire & Police Telegraph Co. The funds to which the Gamewell Co. was entitled under its judgment against the Fire & Police Telegraph Co. were subjected to the payment of this judgment. In affirming these judgments, it was held that:

(1) The character of a corporation is determined by the powers expressed in the articles of incorporation, and not by the powers actually exercised; (76 S. W. 866)

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(2) Where a statute creates a new liability of stockholders, a corporation's continuance to do business after such statute takes effect subjects the stockholders to the new liability; (p. 865)

(3) A corporation may be a single stockholder of another corporation and liable as such for double the stock held; (p. 867)

(4) Holding out a corporation as in active competition with a competitor, when all or a controlling part of the capital stock of such corporation is secretly held by or for such competitor, is a fraud upon the public; (p. 867)

(5) Fraud in becoming a stockholder of a corporation cannot be taken advantage of by the person participating in the fraud to relieve himself of liability as such stockholder; (p. 867)

(6) A non-resident creditor who owns stock in a domestic insolvent corporation cannot come into a court of equity and subject to the payment of his debts the assets of such corporation, upon which other creditors have equal claims, and escape from the foreign jurisdiction with a part of this trust fund in his hands, and thereby lessen the pro rata of other creditors, without first doing equity by paying to the other creditors the amount of his statutory liability to them upon these corporate debts as a stockholder in the insolvent corporation; (p. 867)

(7) Under sec. 96, Civ. Code Ky., domestic creditors of an insolvent corporation can protect themselves and enforce their rights against a non-resident creditor and stockholder by counterclaim in proceedings brought against such corporation; (p. 867)

(8) In an action brought against a corporation and one of its stockholders, to enforce his stockholder's liability, a judgment may be rendered against such stockholder without making the other stockholders parties defendant; (p. 866)

(9) Where, in an action against an insolvent corporation, some of numerous creditors appear and defend for the benefit of themselves and other creditors having a common

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or general interest with them, and by order of court such appearing creditors are permitted to sue and defend for all, and the other creditors are enjoined and restrained from prosecuting actions for their relief, except in the pending action, it is not improper to grant relief to all of the creditors of such corporation in said action; (pp. 867, 868) and

(10) Error committed against a party litigant is available to him alone. (p. 868)

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## GATZOW v. BUENING.

(106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 17, 1900.)

### Damages; Special Verdict.

There existed in Milwaukee a liverymen's association, organized for the purpose of limiting its members' services to persons patronizing them exclusively, of monopolizing and controlling the livery busines in Milwaukee, and of fixing and maintaining prices in and about such business. While S was a member of this association, his hearse and livery were hired by G to bury a member of his family. To direct this funeral, G also hired the services of a non-member of this association. This being against the by-laws of the association, its secretary stopped the funeral by having S withdraw his hearse. G was thereupon greatly inconvenienced and humiliated. In an action for damages against S and other members of the association, judgment was given against them. This judgment was reversed on appeal, the court holding that:

(1) In the absence of statute mental suffering alone is no ground for recovery of damages; (49 L. R. A. 482½)

(2) A party is entitled to compensatory damages as a matter of right; (p. 482½)

(3) The allowance of exemplary damages is a matter for the discretion of the jury; (p. 482½)

(4) Sec. 4222, subd. 5, Rev. Stat., does not apply to injuries caused by conspiracy; (p. 479)

(5) Failure to object to the collected jury waives previous objection to any of the jurors; (p. 479)

(6) The judge, and not counsel, is charged with the duty of preparing a special verdict where one is seasonably requested; (p. 481) and

(7) Any combination of natural or artificial persons to unreasonably restrict legitimate trade or commerce in any field by stifling competition or preventing the free exercise of individual freedom to dispose of one's labor or capital is unlawful. (pp. 480½, 481)



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## GETZ BROS. & CO. v. FEDERAL SALT CO.

(81 Pac. 416, Cal. 1905.)

### Contracts; Trade Restraint.

As part of one transaction G and F entered into two agreements. By one of these contracts G sold to F a quantity of salt at a fixed price, agreeing not to purchase from others salt for the period of two years and to discourage any one else from dealing in salt. By another agreement G stipulated with F to purchase from F for the period of two years all salt that should be necessary for G's trade. Although a definite sum was fixed as the purchase price for the salt in the first contract it was apparent that such sum formed also the consideration for the other agreement and covenants. In an action by G on F's checks, given in payment of said salt, the suit was defended on the ground that the checks were a part of an illegal transaction, which was against public policy, in restraint of trade, and contrary to the Sherman anti-trust law. In the trial court, the defendant had judgment. On appeal, this judgment was affirmed, the court holding that:

(1) An agreement to refrain from purchasing in the state or importing from without the state a certain commodity, and to discourage others from doing the like, for a period of two years, is void under sec. 1673, Civ. Code (Cal.); and

(2) Where a part of consideration for an entire contract is illegal, the whole contract is void.

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## GIBBS v. CONSOLIDATED GAS CO.

(130 U. S. 396, 32 L. ed. 979, Md. 1889.)

**Contracts; Particeps Criminis; Statutes.**

The legislature of Maryland in 1882 passed a private act prohibiting, among other things, the Equitable Gas-Light Company of Baltimore city from entering into any consolidation, combination or contract with any other gas company whatever, and declaring any such contracts or combinations to be utterly null and void. In 1884 said company entered into a contract with the Consolidated Gas Company of Baltimore city, whereby one of these companies was not to extend its gas operations. By this contract the price of gas was fixed for both companies throughout Baltimore, competition between them entirely eliminated, and the profits above the cost of gas pooled by each of them in certain proportions. The entering into of this contract was brought about by one Gibbs under an alleged agreement. In a suit brought by him to recover compensation, judgment was given for the defendant. On appeal this judgment was affirmed, the court holding that:

(1) Any contract, provision or stipulation which interferes with, or is in violation of, statute is void and unenforcible; (130 U. S. 410)

(2) No recovery can be had for services rendered or losses incurred by a party who knowingly brings about the execution of an illegal contract between others; (p. 405)

(3) Combinations among those engaged in business impressed with public or *quasi*-public character, which are manifestly prejudicial to the public interest, are unlawful; (p. 410)

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(4) Where, in granting a charter to a corporation, a legislature reserves the right to alter, amend, or repeal such grant at pleasure, any amendment or alteration of such charter may thereafter be made by the legislature which will not defeat or substantially impair the object of the grant, or any right vested under it, and which the legislature may deem necessary; (p. 408)

(5) Continuing business after a statute is amended is an acceptance of such statute; (p. 408) and

(6) Where, on the trial of a case, a material fact is clearly established, it is not necessary to submit such fact to the consideration of the jury. (p. 404)

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## GIBBS v. McNEELEY et al.

(118 Fed. 120, 60 L. R. A. 152, U. S. C. C. A., Wash. 1902.)

### Interstate Commerce; Manufacture.

One hundred and eight Washington manufacturers and wholesalers of red-cedar shingles were in a voluntary organization called the Washington Red-Cedar Shingle Manufacturers' Association, the main object of which was to establish and maintain prices at which shingles should be sold to retailers and whenever desirable or profitable to close down mills and to take other necessary steps to limit the manufacture of shingles. The greater portion of the shingles manufactured in Washington were for foreign sale and shipment. In carrying out the association's object prices were advanced and some mills were shut down. This, it was claimed, had the effect of injuring a dealer in shingles. This dealer sued the officers of the association for damages under sec. 7 of the Sherman anti-trust act, stating his cause of action in four counts. As to three counts, a demurrer was sustained and the case was tried on one of them, resulting in the court's direction to a jury to render a verdict for the defendants. This judgment was reversed, the court holding that:

(1) An agreement or combination which directly restrains not only the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several states, is a matter of interstate commerce; and

(2) An association which regulates prices of goods manufactured wholly within the state more than four-fifths of which is intended for foreign markets, limits the production of these goods, and prevents competiton, and is within the Sherman anti-trust law.

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## GLADISH v. BRIDGEFORD

(89 S. W. 77, Mo. App. 1905.)

### Boycott.

The Kansas City Live Stock Exchange, a voluntary association, was organized and maintained as a commercial Exchange, not for pecuniary profit, "to promote and protect all interests concerned in the purchase and sale of live stock at the Kansas City Stock-yards; to promote uniformity in custom and usage at said market; to inculcate and enforce correct and high moral principles in the transaction of business; to inspire confidence in the methods and integrity of its members; to provide facilities for the orderly and proper conduct of business; to facilitate the speedy and equitable adjustment of disputes; and, generally, to promote the welfare of the Kansas City market." S, engaged in live stock commission business and a member of this exchange, was by a customer entrusted with money to purchase cattle. He made the purchase and attempted to pay for the cattle with his worthless check. On discovery of S's insolvency, the vendor replevied the cattle. Soon afterwards S failed in business and the customer lost his money and said cattle. Charges were thereupon preferred against S for uncommercial conduct. He was tried, found guilty, and expelled from said exchange. As a consequence of his expulsion, the members of said exchange were notified not to have any further business dealings with S. Not being able to transact business on account of said expulsion, S sought to enjoin the members of the exchange from enforcing its orders and penalties against him. A permanent injunction having been granted, the order was appealed from. In reversing the lower court, it was held that:

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It is not unlawful for members of a voluntary association to refuse to deal with another member who has been found guilty of wrongdoing by and expelled from such an association.

NOTE.

Although the decision on the validity of the association involved is directly opposite to the conclusion reached by the Kansas court of appeals in Greer v. Payne, on the facts presented, the decision in this case is correct. The facts here were insufficient to show the association's true objects.

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## GRAY v. OXNARD BROS. CO.

(13 N. Y. Supp. 86, 1891.)

### Illegal Contract; Unenforcibility; Receivers.

The receiver of the property and effects of the North River Sugar Refining Company, in an action against Oxnard Bros. Co. and others, claimed a portion of the profits of a certain copartnership under a deed which had been previously declared to constitute an illegal combination between his company and other parties, firms and corporations entering into it as the "Sugar Refineries Company." The partnership was formed by the North River Sugar Refining Company, and the profits were claimed under said deed. A demurrer to the receiver's petition was sustained. In reviewing and affirming the action of the trial court, it was held that:

(1) Rights growing out of an illegal combination are unenforcible; and

(2) Under the special circumstances of this case, the receiver had no title to any part of the assets of the "Sugar Refineries Company," as against certificate holders.

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## GILBERT v. AMERICAN SURETY CO. OF NEW YORK et al.

(121 Fed. 499 U. S. C. C. A., Ill. 1902.)

**Res Judicata; Federal Practice; Collateral Contracts; Actions, Replevin Bond, Damages.**

Bishop, being engaged in the manufacture of fruit butters and like products, in July, 1888, executed a bill of sale to the American Preservers Company of all of his business property, inventoried at $9,063.03, in consideration of shares of stock in that company of the par value of $33,100, and their assignment to the trustee of a certain trust and receiving from him trust certificates in lieu of said shares to the amount of $66,200. Upon the delivery of this bill of sale, B was employed by the American Preservers Company at a salary of $50 per week to conduct the business thus sold, and was placed in possession of his former property as said company's agent for said purpose. He thereupon opened a new set of books for said vendee, insured said property in its name, and made to it periodical reports. In December, 1888, and in March, 1889, B tendered back said trust certificates to the trustee of the trust and demanded possession of his property, but remained in possession for said vendee and made said reports until March, 1891, when he attempted to repudiate said transaction, claiming to have been advised that it was illegal because in aid of a trust or monopoly created to control the entire manufacture and sale of fruit butters and like products throughout the United States. In May, 1891, the American Preservers Company brought replevin against B in an Illinois state court, executing the usual bond for double the value of the property involved, the American Surety Co. of New York becoming surety on the bond.

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The sheriff thereupon took said property from B and delivered same to the American Preservers Company. The trial of this suit resulted in a judgment for the plaintiff, which was affirmed by the appellate court. Upon further appeal to the supreme court, this judgment was reversed and a new trial awarded on the ground of improper exclusion of evidence. This case was afterwards redocketed in the trial court, but in May, 1898 was dismissed without a trial upon the merits, the judgment then entered being for the return of the property taken under the writ, together with costs of suit. From this judgment the Preservers Company appealed, first to the appellate court and then to the supreme court, both courts affirming the judgment of the lower court. The present suit is upon the replevin bond. The defendants in this proceeding pleaded in mitigation of damages under the Illinois statute that the property in the replevin suit was the property of the American Preservers Company. The plaintiff replied by setting up the proceedings and rulings in the replevin suit, but the court refused to permit proof of these facts, directing "a verdict for the plaintiff, and to assess plaintiff's damages at debt $22,000, and damages at the sum of one cent, said debt to be satisfied upon payment of said damages of one cent and costs of suit." On writ of error, this judgment was affirmed, the court holding that:

(1) "A decree of a court of competent jurisdiction is conclusive, in a second suit between the same parties or their privies, of every matter that was decided therein and that was essential to the decision made;" (p. 501)

(2) Where, however, a former decree or judgment is not based upon the merits in the case, but is one for want of prosecution, the rule or doctrine of *res judicata* is inapplicable; (p. 501)

(3) Where questions arising in a case involve general law, Federal courts cannot avoid the responsibility of deciding

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them for themselves, irrespective of the determination of such questions by the highest court of a state; (p. 502)

(4) When an obligation is collateral to and indirectly connected with an illegal transaction, but is supported by an independent consideration, so that the aid of the illegal transaction to make out a case will not be required, such an obligation is enforcible; (p. 503)

(5) The obligor, upon a replevin bond given in a replevin suit in which the merits are left undetermined, in Illinois may plead, in mitigation of damages, the title to the property in dispute in the replevin suit; (p. 501) and

(6) Stenographers' fees and attorneys' fees incidental to the conduct of a replevin suit cannot be recovered as part of damages in a suit upon a replevin bond. (p. 504).

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## GREER v. PAYNE.

(4 Kan. App. 153, 46 Pac. 190, 1896.)

### Particeps Criminis.

In this case it was shown that there existed at Kansas City, Kansas, a voluntary association known as Kansas City Live Stock Exchange; that its expressed objects were to promote and protect all interests connected with the buying and selling of live stock at Kansas City stock-yards, and to promulgate and enforce amongst its members correct and high moral principles in the transaction of business; that it was not maintained for pecuniary profit; that it fixed and maintained a minimum charge for commissions in the buying and selling of stock; that it provided for heavy penalties in case of violation of any of its by-laws; and its members were prohibited from doing business with suspended or expelled members and non-members. Nearly all the persons, firms and corporations doing business as live stock commission merchants at Kansas City were members of said exchange. Having violated the rules with reference to commission charges, Greer et al., were by the association, tried, found guilty and fined. To avoid payment of such fine and the consequent suspension and expulsion from the association, G brought injunction proceedings against the officers of the association. The defendants had judgment below. On appeal, this judgment was affirmed, the court holding that:

(1) A court of equity will aid neither party to an illegal transaction or combination;

(2) In determining the character of an association its articles of association, rules and by-laws must be taken as a whole;

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(3) The law looks to the substance and not to the form of things; and

(4) A voluntary association of live stock commission merchants which regulates and maintains uniform charges for services in buying and selling live stock is in restraint of trade and unlawful.

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## GREER, MILLS & CO. v. STOLLER.

(77 Fed. 1, U. S. C. C., Mo. 1896.)

### Jurisdiction; Parties.

Members of the Kansas City Live Stock Exchange (a voluntary association) sought to restrain its board of directors from enforcing payment of a fine and other penalties imposed upon them for having violated some of the association's rules and by-laws. One of the members of said board was a non-resident and could not have been sued in the state unless the action could have been brought under the Sherman anti-trust law. In the disposition of this cause no attempt was made to pass upon the legal character of said association. Injunctive relief was refused, because:

(1) Federal courts, under Act of July 2, 1890 (Sherman anti-trust law) have no jurisdiction over non-residents without their consent in a proceeding brought by private persons or corporations for an injunction;

(2) Where the management of the affairs of a voluntary association is entrusted to a limited number if its members, a suit against the association founded upon contract to be binding must be against all of the managing members; and

(3) "Where persons have not only an interest in the controversy, but such an interest that a final decree would affect it, or leave the controversy to be fought over in subdivisions, in order to conclude the rights and measure out the equities of all, they are indispensable parties to the exercise of jurisdiction."

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## GULF, COLORADO & SANTA FE RY. CO. v. STATE.

(72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815, 1888.)

### Construction; Judicial Notice.

One of the purposes of the Texas Traffic Association was to prevent "sudden and extreme fluctuations in Texas rates." The association was managed by an executive committee composed of a representative from each of its members. This committee was charged with the power to and did classify and fix uniform freight rates to be charged by the members of the association. In an action by the state against several railroads, including two domestic railway companies, to restrain them from carrying out the objects of the association, it was held that:

(1) An association between parallel and competing railroads, whereby uniform freight rates to be charged for goods carried to and from points within the state are established, is illegal;

(2) Where a combination is illegal as to some of the parties in it, the combination is illegal as to all;

(3) A court will take judicial notice of established railroads within the state and of whether their lines are parallel and competing; and

(4) In the absence of an exception on account of vagueness or indirectness of allegation in a petition, every reasonable intendment is indulged in favor of its sufficiency.

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## HADLEY-DEAN PLATE GLASS CO. v. HIGHLAND GLASS CO.

(143 Fed. 242, U. S. C. C. A., Mo. 1906.)

**Construction; Contracts; Damages; Interstate Commerce.**

This was an action for damages on account of breach of a contract between a Pennsylvania corporation and a Missouri company. The latter company ordered a quantity of glass from the Pennsylvania corporation engaged in the manufacture of glass. On refusal to further carry out this contract the Missouri company was sued. As part of the defense it was shown that at the time of the making of said contract the plaintiff was in an unlawful combination to stifle competition in the sale of glass and to arbitrarily increase its price. The trial court directed a verdict in plaintiff's favor and entered judgment. This was affirmed on appeal, the reviewing court holding that:

(1) When a contract for the manufacture or supply of an article is qualified with reference to quantity by the words "more or less," unless supplemented by language giving them a broader scope, they apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with the transaction;

(2) Where a contract for the manufacture and delivery of goods is repudiated by the vendee before the goods are manufactured, the measure of the vendor's damages is the difference between the cost of manufacture and delivery and the contract price;

(3) The Sherman anti-trust law has no application to a contract made by an unlawful combination, when such contract is collateral to and unconnected from such combination; and

(4) State anti-trust laws are inapplicable to interstate contracts.

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## HAGAN et al. v. BLINDELL et al.

(56 Fed. 696, U. S. C. C. A., La. 1893.)

This merely affirms the case of Blindell v. Hagan, 54 Fed. 40, 56 Fed. 696.



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## HALE v. HENKEL.

(26 Sup. Ct. Rep. 371, 201 U. S. 43, 50 L. ed. 652, N. Y. 1906.)

### Witnesses; Immunity.

Hale, secretary and treasurer and also a director of MacAndrews & Forbes Co., was subpoenaed to produce certain documents and to testify before a grand jury on behalf of the government in an action between it and his company and the American Tobacco Company. After appearing before the grand jury he refused to testify, principally because his testimony might tend to incriminate him. He was then cited before a United States circuit court, who directed him to testify. Still refusing, the court committed him to the custody of the marshal, until he should obey the court's order. Thereupon another judge of the same court issued a writ of *habeas corpus*, and after a hearing refused to discharge the prisoner. On appeal from this order and in affirmance thereof, it was held that:

(1) An agent of an individual or corporation called upon to testify cannot claim immunity under the 5th amendment to the Federal constitution on behalf of such individual or corporation; (26 Sup. Ct. Rep. 377)

(2) Under Federal practice a specific written charge against the party under investigation before a grand jury is unnecessary—a Federal grand jury is authorized to act upon information of witnesses without a formal presentment, indictment or other charge previously laid, provided there is a particular case before it for investigation; (p. 374)

(3) The amendment of February 25, 1903 (Immunity Act) to the Sherman Act affords complete immunity to a witness examined in a case brought under it; (p. 376)

(4) By reason of the Immunity Act of 1903, a witness

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cannot avail himself of the search and seizure clause of the 4th amendment to the Federal constitution; (p. 378½) and

(5) A corporation, as an individual, is entitled to protection under the 4th amendment to the Federal constitution from unreasonable searches and seizures. (p. 379)

NOTE

What was said in the foregoing opinion regarding a corporation not being entitled to claim immunity from self-incrimination under 5th amendment to Federal constitution was not necessary to a decision of the case. The corporation in whose behalf immunity was sought was not before the court. The immunity claimed on behalf of the corporation was not set up in such a form as to present squarely the issue that the corporation itself was claiming such immunity. The case simply applied the principle that the privilege in question is personal and cannot be claimed for another. Nothing else was necessary to the decision of the case on this point.

The dissenting opinion of Justice Brewer, concurred in by the chief justice, is correct on principle. It is a fact worthy of notice that in McAlister v. Henkel, decided at the same term of court and immediately after an opinion in Hale v. Henkel was handed down, there was not a single dissent. The McAlister case was decided squarely on the proposition that the privilege of immunity is personal to the witness, and that no one can claim it for another person or corporation. The question whether a corporation is or is not entitled to immunity is still open in the United States Supreme Court.

Since the foregoing was written Congress passed Act June 30, 1906, c. 3920, 34 Stat. at L. 798, Fed. Stat. Ann., Supp. 1907, p. 382, limiting immunity to natural "persons."

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## HAMILTON v. SAVANNAH, FLORIDA & WESTERN RY. CO.

(49 Fed. 412, U. S. C. C., Ga. 1892.)

**Contracts; Capital Stock Ownership; Injunction; Parties.**

In 1885, W. V. McCracken & Co., a New York partnership, obtained fifty-one per cent of the capital stock of East Georgia & Florida R. R. Co., which was organized under Georgia laws to construct a line of road connecting with another railroad. By a contract and conveyance made in 1886 said firm obtained all the right, title and interest to and in the Great Southern Ry. Co., also a Georgia corporation, and agreed to provide the right of way and build and construct the road for the East Georgia & Florida R. R. Co. It appeared that at the time of making this contract and conveyance McCracken & Co. did not intend to build said road, but to sell the acquired properties to the Savannah, Florida & Western Ry. Co., which likewise was a Georgia corporation, and a would-be competitor of the East Georgia & Florida R. R. Co. In a proceeding by the promoters of the East Georgia & Florida R. R. Co. seeking the annulment of said contract and conveyance, and the recaption of certain stock, it was held that:

(1) Par. 4, sec. 2, art. 4, Const. 1877, prohibits corporations from owning shares of stock in other competing corporations; (pp. 422, 423)

(2) Contracts which tend to defeat or lessen competition in the business of corporations, or which have the effect or tend to encourage monopoly, are illegal and void; (pp. 422, 423)

(3) Money or property parted with in good faith under

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an *ultra vires* contract may be recovered back or compensation had for it; (p. 425)

(4) An injunction *pendente lite* will be granted when it sufficiently appears that the party seeking the injunction has such rights as give him a standing in court; (p. 426) and

(5) Where a United States court has jurisdiction over the subject-matter in controversy and the principal defendant, and can do full justice in the matter to all of the parties before it, a party interested in such subject-matter under a contract which is absolutely void is not an indispensable party to a suit in equity to set aside such contract. (p. 421)

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## HAMMOND PACKING CO. v. STATE.

(— Ark. —, 100 S. W. 407, 1199, 1907.)

**Statutes, Validity; Constitutional Law, Due Process of Law; Foreign Corporations; Practice, Evidence.**

This was an action by the state against the Hammond Packing Co., based upon the anti-trust act of January 23, 1905. The complaint charged the defendant, a foreign corporation, with transacting business in Arkansas on certain dates while the defendant was a member of, or a party to, a combination to regulate, fix, and maintain the selling price of a certain commodity. There was no intimation in the complaint that the fixing and regulating of the prices related to Arkansas, neither were the terms of the confederation stated, nor was it stated when, how or where the defendant became a member of the illegal combination. The defendant therefore moved the court for a rule upon the plaintiff to make its complaint more specific and certain. This motion was overruled. The defendant then moved for an order directing that all depositions to be taken outside of the county in which the suit was brought for use in the cause should be taken upon interrogatories, relying upon section 3177, subdivision 5, of Kirby's Digest. The court also overruled this motion. The plaintiff then applied to the court for an order appointing a foreign commissioner to take testimony on oral interrogatories and requiring the defendant to produce certain non-resident witnesses and the books, papers and documents in their possession before such commissioner. The defendant resisted the motion on the ground that the application failed to set out specifically what it was expected to prove by each witness, and also that no description of any desired books was given, nor was it

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shown that the books asked for contained evidence material to the issues in the case. The attorney-general answered by stating that he did not know what could be proved by any one of the witnesses, nor did he know what particular information material to the issues in the case was contained in any book or paper. The defendant's motion was thereupon overruled and an order was entered appointing a foreign commissioner to take depositions at a certain place, directing the defendant to produce certain named persons and all books and papers in their possession or under their control relating to the merits of the cause, and requiring the commissioner to give notice for their appearance before him. To all of the court's rulings the defendant objected and preserved the objections by proper exceptions. The defendant refused to comply with this order on the ground that the court was not warranted in making the order and that it called upon the defendant to surrender rights in the enjoyment of which it was guaranteed by the Constitution of the United States and the state of Arkansas. The plaintiff thereupon moved to strike out the defendant's pleadings and for judgment by default. This motion was granted. The pleadings were then stricken from the files and judgment was entered against the defendant, as authorized by sections 8 and 9, anti-trust act of January 23, 1905. On appeal from this judgment and in affirmance thereof it was held that:

(1) Secs. 8 and 9, Act of January 23, 1905, relating to procedure and practice in procuring testimony in certain trials, and enforcing orders for the production thereof upon sufficient notice and adequate opportunity to defend by striking pleadings from files and entering judgment by default, meet the requirements of the 14th amendment to the Federal Constitution and are therefore valid; (100 S. W. 413½)

(2) A state has full control over civil and criminal pro-

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cedure in its courts except that such procedure must not affect fundamental rights or conflict with any provisions of the Federal Constitution; (p. 413)

(3) The due process clause of the 14th amendment to the Federal Constitution is inapplicable to mere forms of procedure in state courts, or the regulation of practice therein; (p. 413½)

(4) Secs. 8 and 9 Act of January 23, 1905, are constitutional, in so far as they authorize a reasonable order for the production of the books and papers of a corporation over which the state has control; (p. 411)

(5) The constitutional prohibition (sec. 8, art. 2, Const. Ark. 1874), "nor shall any person be compelled, in any criminal case, to be a witness against himself," does not apply to corporations, but to natural persons only; (p. 410½)

(6) Where the provisions of state and Federal Constitutions are identical, the state courts, in construing their provisions, regard as controlling the decisions of the supreme court of the United States upon like Federal provisions; (p. 410)

(7) The first ten amendments of the Federal Constitution operate upon the Federal Government only and cannot be invoked against state legislation; (p. 410½)

(8) The action authorized by sec. 1, Act of January 23, 1905, is purely statutory for the recovery of a penalty and is not a "criminal charge" within the meaning of sec. 8, art. 2, Const., 1874, requiring that "no person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury;" (p. 410)

(9) Foreign corporations doing business within a state are subject to the same control and regulations as domestic companies; (p. 411)

(10) Under secs. 8 and 9, Act of January 23, 1905, a corporation is required, on proper demand, to make a bona fide effort to have any given officer, agent, or employe present at the time named for examination as a witness, and, in case of production of books and papers, to see that the given officer or agent produces the books or papers; (p. 411½)

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(11) The reasonableness of an order requiring the production of books and papers so as not to come within the prohibition of the 4th amendment of the Federal Constitution must be determined in each case as it arises; (p. 411) and

(12) To raise the question of unreasonable search and seizure of books and papers under the constitutional provision against such seizure upon an order requiring the witness to appear for oral examination and produce the books, etc., an appearance by the witness before the examining officer, pursuant to the order to appear, or a proper excuse for non-appearance, is necessary, and after compliance with the order to that extent the witness may then refuse to produce the books and papers. (p. 411).

NOTE.

At the time of rendering the foregoing opinion, the supreme court of Arkansas consisted, as it does now, of five justices. Battle, J., dissented without writing an opinion. Wood, J., concurred in the judgment to the extent that sections 8 and 9 of Act of January 23, 1905, are constitutional, but held that section 1 of said Act was in legal effect, similar to section 1 of the Act of March 6, 1899; that under the construction given section 1 of 1899 Act, section 1 of the 1905 Act was unconstitutional on the ground that it had an extra-territorial effect; that the provision of said Act are interdependent so that they can not be separated; and that, therefore, the whole Act of January 23, 1905, is unconstitutional.

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## HARDING v. AMERICAN GLUCOSE COMPANY.

(182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738, 1899.)

**Corporations; Consolidation; Voluntary Dissolution; Foreign Corporations; Minority Stockholders; Injunction; Practice; Lis Pendens.**

In 1897 one New Jersey and three Illinois corporations, one of them operating in Chicago, two in Peoria and one in Rockford, Illinois, and all of them being competitors in the same line of business, designed a scheme to unite their properties and business in one ownership. A consolidation of these corporations was effected by means of each corporation giving an option for the purchase of its plant, etc., to a designated bank. By these options the respective companies agreed to sell all of their real and personal property, together with their good will, trade rights, trade-marks, and the right to use their patents, to the bank, upon its request, or the request of its assignee, made before a fixed date. Some of these option-contracts provided for the payment of the purchase money with capital stock of a corporation about to be organized. All of the options contained a provision binding the optioner not to engage in the class of business to be sold for a certain time within a designated territory. To take over the properties and businesses of these several corporations, on August 2, 1897, the Glucose Sugar Refining Company was organized under the laws of New Jersey, with an authorized capital stock of $40,000,000. All of the contracts and conveyances were made by said companies with third parties, who transferred and assigned them to the new company. The acts done in pursuance of

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said scheme were performed as a single transaction by the parties who were principally the officers, directors, attorneys and majority stockholders in the respective corporations, nearly all of them being Illinois citizens. The plants of these corporations were situated in a district specially adapted for growing the product used in manufacture. On August 3, 1897, but before the conveyances became matters of record, Harding, as stockholder of one of said corporations (American Glucose Co., a foreign corporation), on behalf of himself and other stockholders similarly situated, brought suit to enjoin and prevent the directors of said company from entering into and becoming a part of said pool, trust or combination of manufacturers and dealers in glucose and grape sugar, formed, or, as he claimed, about to be formed, in the United States. After showing who were in control of said company, he charged that its officers and directors voted themselves large sums of money as salaries; that a pool, trust or combine was being formed in glucose and grape sugar; and that the officers and directors were about to transfer the properties of said company to such trust, claiming that the carrying out of this transaction would result to his pecuniary injury. Subsequently the bill was amended. Some of the defendants demurred and others answered. After a hearing upon the evidence, the bill was dismissed for want of equity. In reversing this judgment, it was held that:

(1) An agreement or understanding between nearly all of the competing corporations manufacturing an industrial product, to withdraw from its manufacture and sale, and consolidate their respective properties and businesses under one corporate ownership, is an unlawful combination and trust; (182 Ill. 615, 616, 625)

(2) When the necessary consequences of a combination are to control prices, or to limit production, or to suppress

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competition, in a way as to create a monopoly in an industrial or commercial product, the combination is unlawful; (p. 615)

(3) A contract is in general restraint of trade when the trade restrained can only be exercised within a district where the restraint is made to operate; (p. 638)

(4) The agreement constituting an illegal combination may either be in writing or it may rest in parol, or the understanding may be evidenced by actions of the parties concerned; (p. 617)

(5) A majority of stockholders cannot legally effect a virtual voluntary dissolution of a solvent corporation by conveying all of its property and business to an unlawful combination; (p. 628)

(6) An Illinois banking corporation has no power to take an option for the purchase of a manufacturing plant; (p. 609)

(7) Corporate acts done outside of the state of a corporation's creation have no force, and this rule applies to foreign as well as domestic companies; (pp. 614, 615)

(8) "A contract made in one state will not be enforced in another when, to do so, would contravene the criminal laws of the latter state, or would be against the express prohibition of its laws;" (p. 636)

(9) A foreign corporation owning property and doing business in Illinois is subject to the same regulations and restrictions as a domestic corporation, and has no other or greater powers; (pp. 634, 635)

(10) A foreign corporation is not permitted to own or hold real property conveyed to it as part of an illegal combination;" (p. 637)

(11) "The validity of all transactions relating to land depends upon the laws of the state where the land is situated;" (p. 637)

(12) Minority stockholders may restrain a solvent corporation from entering into or becoming a part of an illegal combination, where the action on behalf of the corporation, by a majority of its stockholders, is cause for forfeiture of its charter and for dissolution under statute

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and will otherwise pecuniarily injure the minority stockholders, provided such stockholders do not seek a forfeiture of the corporation's charter and its dissolution on account of such action and had not participated in the illegal transactions complained of; (p. 627, etc.)

(13) "Equity permits a stockholder, either individually or on behalf of other stockholders similarly situated, to bring such a suit, where the corporation itself either refuses to do so, or where the facts show that the wrongdoing defendants constitute a majority of the managing body, or where it is reasonably certain that a demand made upon the proper officers of a corporation to bring the action, would be unavailing;" (p. 629)

(14) After a bill has been taken as confessed against a defaulting defendant, its dismissal for want of equity is improper when the bill is sufficient on its face to sustain the complainant's contention and entitles him to the relief prayed; (p. 590)

(15) A defendant cannot demur and answer to the same part of a bill at the same time; (p. 641)

(16) Under sec. 18, Chancery Act, for final decree, a court may consider proof taken prior or subsequent to entering a decree *pro confesso;* (p. 590)

(17) Where no self-incrimination or privileged communication is involved in a question, an answer to it cannot be refused on account of its being immaterial; (p. 643)

(18) When it is within the power of a witness to make answer, his refusal is competent evidence against him; (p. 643) and

(19) *Lis pendens* begins from the service of summons or subpoena after the filing of the bill, and all acts performed thereafter by defendants are considered done *pendente lite.* (p. 642)

NOTE.

On October 14, 1902, this case was dismissed by the United States supreme court pursuant to tenth rule. (187 U. S. 651, 47 L. ed. 349)

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## HARRIMAN v. NORTHERN SECURITIES CO.

(25 Sup. Ct. Rep. 493, 197 U. S. 244, 49 L. ed. 739, N. J. 1905.)

**Illegal Contract: Recovery of Property; Laches; Chancery Practice.**

The Northern Pacific Railway Company, represented by J. P. Morgan & Co., had an authorized capital stock of $155,000,000, divided into $80,000,000 of common stock and $75,000,000 of preferred stock. This company, together with the Great Northern Railway Company, controlled by James J. Hill, acquired, in April, 1901, all (?) of the shares of stock of the Chicago, Burlington & Quincy Railroad Company. Shortly afterwards, in the same month, the Oregon Short Line Railroad Company, which was a part of the Union Pacific Railway system, and controlled by Edward H. Harriman's party, at their instance, purchased Northern Pacific preferred stock to the amount of $41,085,000 and common stock to the amount of $37,023,000, aggregating $78,108,000, being a majority of the $155,000,000 of the capital stock of the Northern Pacific Railway Co. The preferred stock of this company was subject to retirement at its option. In that event a majority of the common stock held by the Morgan-Hill party would have been in control of the Northern Pacific Railway Co. Subsequently the preferred stock of the Northern Pacific was retired, the Harriman interests participating in the corporate proceedings accomplishing this result. In November, 1901, the Northern Securities Company was organized under the laws of New Jersey, with an authorized capital stock of $400,000,000. Immediately afterwards, at a directors' meeting of this company, it was authorized to purchase $37,-

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023,000 of common and $41,085,000 preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable, $82,491,871 in fully paid-up and non-assessable shares of Northern Securities Company at par, and $8,915,629 in cash. While Harriman was not present at this meeting, he attended a subsequent meeting, at which the minutes of the former meeting were read and approved. This stock transaction was carried out by the proper delivery and exchange of shares of stock of the respective companies and the payment of the cash. In April 1903 the Northern Securities Company was, by a United States circuit court, declared to be an illegal combination, and, on affirmance of this decree by the United States supreme court, the directors of said company adopted a plan to reduce said company's capital stock ninety-nine per cent and distribute the shares of stock acquired during the existence of said company (1,537,594 shares of the Northern Pacific Railway Company and 1,181,242 shares of the Great Northern Railway Company) among its stockholders. To prevent this distribution and regain possession of the original shares of stock purchased by the Northern Securities Company from Harriman and his party for $91,407,500, the latter brought court proceedings. A preliminary injunction having been granted, and an appeal taken, the circuit court of appeals reversed the order. On further appeal to the supreme court that court affirmed the judgment of the circuit court of appeals and ordered the circuit court to enter a final decree dismissing the bill. In the course of its opinion it was held that:

(1) Property or money parted with under an illegal, executed contract unrepudiated by the other party cannot be recovered back by any one *in pari delicto;*

(2) Neither party to an illegal contract will be aided by a court of law or equity to enforce the contract or set it aside, unless the contract is executory or the parties are

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considered not in equal fault, in which case relief is granted under the special considerations of equity, justice or public policy;

(3) The right to withdraw from an illegal, executed contract is lost or barred when rights of innocent third parties might be affected by such withdrawal; and

(4) Where a temporary injunction is granted *pendente lite* upon affidavits and the order is appealed from, on reversal of such an order, the case should be remanded for a full hearing only when, under the particular circumstances, some fact or some point may be brought out for lack of which, in the appellate court, jurisdiction of the case cannot be taken, or the rights of the parties cannot be properly passed upon. Where, from the face of the bill, it is clear in the opinion of the appellate court that the complainant is not entitled to relief, and such defect is incapable of remedy by amendment, to save protracted litigation, such a court may direct a final decree of dismissal.

NOTE.

Point four (4) is adduced from a consideration of Mast F. & Co. v. Stover Mfg. Co. (44 L. ed., 856, 860½) referred to and relied upon in the opinion.

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## HARRISON v. GLUCOSE SUGAR REFINING CO.

(116 Fed. 304, 58 L. R. A. 915, U. S. C. C. A., Ill. 1902.)

**Contracts; Exclusive Employment; Collateral Attack; Injunction.**

In consideration of being employed by Glucose Sugar Refining Co. for five years, at a stated salary, Harrison agreed to give his exclusive services to said company's business, and during such time not to directly or indirectly perform like services or be interested in any one else's similar business. Before the expiration of this contract Harrison severed his connection from the glucose company without cause. In a proceeding to restrain Harrison from performing services for a competitor of the glucose company, it was held:

(1) A contract for exclusive services of an individual to operate within a specified locality during a particular period is not in restraint of trade and against public policy;

(2) Where a contract is unconnected with any of the purposes of an illegal combination, the fact that one of the parties to the contract constitutes an unlawful combination in restraint of trade does not affect the validity of such contract; and

(3) Injunction is a proper remedy to restrain a party from divulging trade secrets which he has agreed to keep secret.



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## HART Atty. Gen. v. ATLANTA TERMINAL CO. et al.

(— Ga. —, 58 S. E. 452, 1907.)

**Exclusive Contracts; Railroads; Injunction; Practice.**

This was a proceeding by the attorney general against the Atlanta Terminal Co., a domestic railroad corporation, and certain other railroad companies using a terminal station at Atlanta, to declare void certain exclusive privileges granted to the Atlanta Baggage & Cab Co. and to enjoin the defendants from continuing them. These privileges were as follows: (a) The Terminal Co. supplied the Cab Co. with a corner of said station in which to store outgoing baggage prior to the checking of the same by railroad checks; (b) it permitted the Cab Co. to solicit business on the depot property; and (c) it allowed the Cab Co. to board cars of said railway companies for the purpose of soliciting the delivery of incoming baggage. In consequence of this arrangement, the Terminal Co. refused to receive in the unrented portion of said depot any baggage unless the same was accompanied by railroad check or other right to travel on one of said roads. Each of the foregoing privileges was claimed to be illegal. The defendants answered. Upon a refusal to grant an injunction, the case was brought before the supreme court on writ of error. In affirming said judgment it was held that:

(1) A railway company may grant to a single corporation or individual the exclusive right to enter its trains to solicit the transportation of passengers and baggage, or, by renting to such corporation or individual a portion of its baggage room, concede to it or him the privileges necessarily incident to the occupancy and use thereof, provided that in so doing such railway company does not interfere with the exercise by

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any other person of any right which he may lawfully demand of it as a common carrier; (syl. 2)

(2) With reference to passengers and their baggage the duty of a railroad company in its capacity as a common carrier begins with affording to them, and to all of them alike, proper and suitable facilities for entering depots to purchase tickets and take passage and for checking baggage, and ends with affording to them like facilities for leaving such depots and obtaining their baggage on presenting the checks therefor; (syl. 2)

(3) A contract between a railway company and an express company whereby the latter is given the exclusive right to enter the trains of the former to solicit the transportation of passengers and baggage, or the former rents to the latter a portion of its baggage room with the exclusive privileges necessarily incident to the occupancy and use thereof is not within art. 4, sec. 2, par. 4, of Georgia Constitution, provided that in so doing the railway company does not interfere with the exercise by any other person of any right which he may lawfully demand of it as a common carrier;

(4) Whenever a *quasi*-public corporation withholds a duty from the public, an application in behalf of the public for an injunction is an appropriate remedy; (syl. 6)

(5) When an injunction is prayed to enjoin the prosecution of a course of conduct claimed to be illegal, and upon the trial it is shown that such conduct has been discontinued and that there is no intention to resume the same, a court is justified in refusing injunctive relief; (syl. 1)

(6) Where the evidence is conflicting, it is not an abuse of discretion to deny an injunction; (syl. 4) and

(7) Where an action is brought in behalf of another who is the real plaintiff, an amendment substituting him as such may be granted; (syl. 5)

NOTE.

This case was decided by a divided court, the majority opinion being expressed in the syllabus by the court. Freeman, J., dissented in part and held that the arrangement be-

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tween the Terminal Co. and the Baggage Co., renting to the Baggage Co. the exclusive space in the baggage room, constituted an illegal discrimination and was violative of par. 4, sec. 2, art. 4, Constitution (sec. 5800 Code) making it unlawful for the general assembly to authorize any corporation to make any contract having the effect, or intended to have the effect, of defeating or lessening competition and encouraging monopoly.

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## HARTFORD FIRE INSURANCE CO. v. RAYMOND.

(70 Mich. 485, 38 N. W. 474, Mich. 1888.)

**Constitutional Law. Statutes, Title; Foreign Corporations; Mandamus.**

By Act approved June 28, 1887, (Acts 1887, p. 384, No. 285) a foreign insurance company was required, as a condition precedent to transacting business, to enter into a stipulation that it would not directly or indirectly enter into any contract, arrangement, or understanding with any other company or association, the object or effect of which would be to prevent open and free competition in insurance transacted within the state. The Act charged the commissioner of insurance with the duty of revoking licenses of companies which failed to comply with or which violated said law. In 1887, B., an insurance expert, apparently acting independently, established the Michigan Inspection and Rating Bureau, operated by deputy inspectors at various places throughout the state. The general plan of this Bureau was for each subscriber to send daily reports to the particular branch convenient to him or it for inspection and rating according to approved schedules. December 1, 1887, the Hartford Fire Insurance Co., a Connecticut corporation, became a member of this Bureau. In 1888 said insurance company was admitted to do business in Michigan by executing, under written protest, the stipulation required by the foregoing law. Soon afterwards the insurance commissioner, having learned of said company's membership in said Bureau, notified it to appear and show cause why its license should not be revoked. Upon this notice, a hearing before such commissioner was had and said insurance company's license was duly revoked. Before publication of said recovation of license, said insurance company peti-

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tioned for a writ of mandamus to compel the commissioner of insurance to vacate his order of revocation. The relator contended that its adoption of B.'s plan was not such a contract entered into by it with any other company as came within the prohibition of said Act of 1887, and that said Act was unconstitutional. In refusing to issue said writ, it was held that:

(1) Any direct or indirect arrangement between competing foreign insurance companies doing business in the state whereby uniform rates are established and maintained and competition thereby prevented is within Act of 1887, No. 285; (38 N. W. 480)

(2) A constitutional provision that every law shall have but "one object, which should be embraced in its title," requires merely that the title should fairly indicate the general object of the law, and the title of an act to prohibit or regulate a certain business is not invalid because such title fails to embody a statement that it is also for the purpose of punishing violators of the law; (p. 481)

(3) A legislature has power to prescribe as a condition upon which a foreign corporation may do business within the state, that such corporation stipulate that it will not directly or indirectly enter into any contract, etc., the object or effect of which would be to prevent open and free competition in the business to be transacted in the state; (p. 482, *et seq.*)

(4) The granting by a state officer of a license to a foreign corporation to do business or the revoking of such license under certain prescribed conditions and circumstances is ministerial in its nature; (p. 485) and

(5) Mandamus is not a writ of right. (p. 485)

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## HARTFORD FIRE INSURANCE CO. v. STATE.

(— Ark. —, 89 S. W. 42, 1905.)

### Construction; Legislative Power.

Arkansas 1905 anti-trust act prohibits corporations who are, or while they are, members of an illegal combination from doing business in the state. In an action brought by the state against a foreign insurance company it was charged that such company was a member of an unlawful insurance combination formed in another state and that such insurance company was doing business in Arkansas while it remained such member. The insurance company did not deny the charge of being a member of an unlawful combination formed outside of the state. It merely answered claiming that no unlawful combination was formed in Arkansas to regulate or fix prices or premiums on Arkansas property. On a demurrer to the answer and stipulation of parties the insurance company was fined and its right to do business in the state forfeited. In affirming this judgment it was held that:

(1) The mere doing of business by a corporation while it is a party to, or a member of, an illegal combination formed anywhere or which regulates prices or insurance premiums anywhere in or outside of the state is made unlawful by 1905 anti-trust act; and

(2) A legislature has power to exclude a foreign corporation from the state upon its failure to comply with the provisions of said anti-trust act.

NOTE.

This case was decided by a divided court. The reasoning of the dissenters is based on the assumption that a state

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legislature has no power to punish an illegal act committed outside of its jurisdiction. It is true that no such power in a legislature does or could exist. But the crime in this case was not entering into an illegal combination outside of the state. It was the doing or attempting to do business within the state when or while the corporation was a party of an illegal combination. A legislature has ample power to protect people from harmful conditions or persons.

The dissenting opinion of Battle, J., recognizes the distinction between entering into a pool, etc., and doing business after such pool has been created, but claims that the section under consideration could not be construed to embrace the latter. The reasoning of this point is not clear. As the real offense is the doing of business while a member of an unlawful combination, the general remark about extraterritorial power of the legislature is inapplicable.

The dissent of Wood, J., is directly from the majority opinion with reference to the particular crime made punishable—the doing of business while a corporation is a member of an illegal combination. He characterizes such transacting of business, when unconnected with the fixing of prices within the state, as an innocent act. But he seems to overlook the fact that it is within the power of the illegal combination, through its representative in Arkansas, to affect prices or insurance premiums at any time it pleases. The fact of the matter is that whether said act (merely doing business within the state while a member of a "trust") is innocent or not is for the legislature to say. As the legislature had made such act criminal, courts have no power to declare it otherwise.

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## HATHAWAY v. STATE.

(36 Tex. Cr. R. 261, 36 S. W. 465, 1896.)

**Construction; Conspiracy; Indictment; Variance.**

A local agent of the Waters-Pierce Oil Company was indicted under the anti-trust act of 1899 on the charge of conspiracy, because it was claimed said company was part of the Standard Oil Trust and that said local agent was in conspiracy through the Waters-Pierce Oil Company. The state having obtained a conviction, defendant appealed. In reversing this judgment is was held that:

(1) An indictment under article 981, Pen. Code 1895 (L. 1889), against an agent of an unlawful combination or trust must allege such agency and state that he knew of the conspiracy and its purposes;

(2) Article 981, *supra*, provides for two distinct offenses: (a) where persons, etc., engage in a conspiracy against trade or who take a part therein or aid or advise in its commission; (b) where persons, etc., who, as principals, managers, directors, agents, servants or employees, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or orders of such conspiracy;

(3) The indictment in this case charged the agent as principal conspirator;

(4) Under the evidence the charge that defendant was one of the principal conspirators was not established; and

(5) An instruction which charges upon a case not alleged in an indictment is erroneous.

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## HAVEMEYER v. SUPERIOR COURT.

(84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; 87 Cal. 267, 25 Pac. 433, 10 L. R. A. 650, 1890.)

**Prohibition; Quo Warranto; Corporation's Dissolution; Receivers; Lis Pendens; Contempt.**

*Quo warranto* proceedings were brought against American Sugar Refinery Company, a California corporation, and in January, 1890, the defendant was fined $5,000 and its franchise forfeited for being a party to an illegal combination in restraint of trade. Just before trial of the issues in the *quo warranto* action, the American Sugar Refinery Company sold and transferred all of its property and plant to some of its stockholders. On the day after judgment of fine and forfeiture was rendered, the state applied in the *quo warranto* suit for the appointment of a receiver over the properties and assets of the dissolved corporation. A receiver was thereupon appointed. When he attempted to take possession of the properties and assets of the corporation he was informed of said sale, but the purchasers refused to give him possession. The demand by the receiver for possession was the first notice the purchasers claimed to have had of his appointment. They at once made informal application to the court who appointed the receiver for a stay of proceedings until a proper motion could be made for a modification of the order of appointment; but the court positively refused to grant this relief, provided the receiver was given immediate and complete possession of said properties. Finding it impossible to gain peaceable possession, the receiver, on February 18, 1890, applied to the court for and obtained an order directing the sheriff to place the receiver in possession of said

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properties. While the scramble for possession was going on, said purchasers, on February 18, 1890, applied to the supreme court for a writ of prohibition against the judge claiming jurisdiction over the receivership and receiver. Service of this writ was had on the receiver at about 3:30 p. m. and on the judge about 6 p. m. of the same day. After the issuance and service of said writ of prohibition and before it was set down for hearing, said purchasers applied to the supreme court for a rule upon the said judge and receiver to show cause why they should not be punished for contempt, claiming that they disobeyed the order of the supreme court. In granting an absolute and peremptory writ of prohibition and disposing of the contempt proceedings, it was held that:

(1) Whenever an inferior judicial tribunal or officer is *proceeding* beyond his jurisdiction and there is no plain, speedy, and adequate remedy in the ordinary course of law for it, prohibition is the proper means to arrest such proceeding; (24 Pac. 136½, 142)

(2) Under the writ of prohibition complete relief may be afforded not only by preventing further action on the part of the inferior court or officer wrongfully exercising jurisdiction, but by undoing what has been done; (p. 138)

(3) Prohibition is not a proper remedy when the proceeding sought to be prevented is at an end and nothing further remains to be done by the court or the parties to it thereunder; (p. 138)

(4) When demanded by the real party in interest who brings himself clearly within the law, a court has no discretion to refuse a writ of prohibition; (p. 140½)

(5) Before suing out a writ of prohibition, these rules should be observed: (a) "If want of jurisdiction is apparent on the face of the proceeding in the lower court, no plea or preliminary objection is necessary before suing out the writ of prohibition; (b) If the proceeding in the lower court is not on its face without the jurisdiction of such court, but is so in fact by reason of the existence of some matter not

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disclosed, such matter ought to be averred in some proper form in order to make the want of jurisdiction appear;" (p. 141½) (c) But, neither of the foregoing rules is essential to the jurisdiction of the upper court in issuing a writ of prohibition, and whenever a failure to plead or object in the lower court would have been rejected if made, the failure to object or plead is excusable; (p. 142)

(6) The only punishment to be visited upon a corporation whose franchise is unlawfully held or exercised is a forfeiture of such franchise and the imposition of a fine not to exceed $5,000; (p. 132½)

(7) Under sections 399, 400, Civ. Code, and section 564, Code Civ. Proc., upon a voluntary or an involuntary dissolution of a corporation, the matter of liquidation and distribution of property is left to the exclusive control of the directors of the corporation in office at the date of dissolution; (pp. 129, 132)

(8) Upon involuntary dissolution of a corporation, under sections 802 and 809, Code Civ. Proc., a receiver cannot be appointed over property of such dissolved company without a special application made by stockholders or creditors in a new and distinct proceeding under section 565 of said Code; (pp. 134, 135)

(9) Where there is no statute regulating the distribution of property of a dissolved corporation, a court of equity, in a proper proceeding instituted by a creditor or stockholder, will appoint a receiver to administer the assets of such corporation; (p. 128½)

(10) Upon the dissolution of a trading corporation for any cause, its property belongs, after payment of its debts, to its stockholders; (p. 128½)

(11) The appointment of a receiver is ancillary when made before judgment, and is not affected by an appeal of the case in which the appointment takes place. When a receiver is appointed after judgment, an appeal from that judgment suspends the receivership; (p. 134½)

(12) Service of writ of prohibition upon the court appointing a receiver binds its receiver; (p. 137)

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(13) A corporation proceeded against by *quo warranto* is not prevented from disposing of its property, if done in good faith; (p. 135½)

(14) Stockholders of a corporation may become purchasers of its property; (p. 135½)

(15) Where the appointment of a receiver is challenged on jurisdictional grounds, his possession mixed, and scrambled, and is being questioned by a proper proceeding, he must either relinquish possession or answer for contempt; (25 Pac. 435)

(16) Where possession is mixed and scrambled, the legal seisin attaches itself to the right of possession; (p. 435)

(17) A judge is answerable in contempt for his receiver's disobedience of a writ of prohibition directly addressed to him; (p. 432) and

(18) Seeking and acting upon legal advice will not relieve respondents from punishment for disobedience of a writ of prohibition; but, if the advice is sought, given, and acted upon in good faith, the punishment for contempt will be nominal. (p. 435)

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## HAWARDEN v. YOUGHIOGHENY & LEHIGH COAL CO.

(111 Wis. 545, 87 N. W. 472, 55 L. R. A. 838, 1901.)

**Common Law Conspiracy; Damages; Pleading.**

The complaint in this case attempted to state two causes of action. The first count stated, in effect, "that the plaintiff was a retail coal dealer in the city of Superior; that the defendants, 'the wholesalers,' own practically all the coal docks at Superior and Duluth, and that a retailer cannot carry on his business at Superior unless he can buy of the wholesalers freely and without discrimination; that the wholesalers enterd into a combination with the defendant retailers by which it was agreed that the wholesalers should sell coal to the defendant retailers, and to none others, for the purpose, among others, of forcing out of the retail trade all retailers not in the combination, and among others the plaintiff; that such agreement or conspiracy has been successful, and as a result thereof the plaintiff's business has been destroyed, to his damage." The second count set up a cause of action in equity on behalf of a class to restrain further execution of the conspiracy. On a demurrer to both counts the first was declared good, the second bad, the court holding that:

(1) At common law an action for damages will lie against persons who combine or organize to inflict an injury on another, and injury results, although the acts accomplishing the injury would have been legal had they been done by a single person;

(2) Where a conspiracy is directed against a large number of persons, section 2604, Stats. 1898, authorizes one of such persons to sue on behalf of himself and such others as might come within his class;

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(3) Under section 2647, Stats. 1898, two causes of action can be set up in one complaint only when they affect all the parties to the action; and

(4) A claim for damages, which is personal to the plaintiff, and an injunction to prevent injury to others of his class, are independent causes of action and cannot be set up in one complaint under section 2647, Stats. 1898.

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## HEATON-PENINSULAR BUTTON-FASTENER CO. v. EUREKA SPECIALTY CO. et al.

(25 C. C. A. 267, 77 Fed. 288, 35 L. R. A. 728, U. S. C. C. A., Mich. 1896.)

**Patent Monopoly in Unpatented Article; Patent; Infringement; Jurisdiction.**

H., a corporation, being the sole owner of several patented inventions relating to fastening buttons to shoes with metallic fasteners or staples, sold machines manufactured under these patents, only upon condition that the purchaser use them with fasteners made by H. or its predecessor. The machines were sold at cost, the only profit to the seller being that derived from the sale of said fasteners. E. and others, having full knowledge of the aforesaid condition of sale, entered upon the manufacture and sale of staples adapted for use with H.'s machines only. Thereupon H. filed a bill in equity against E. and the others alleging the foregoing facts and charging them with maliciously inducing H.'s licensees to continuously violate the restrictions placed upon the use of its machines, and with being guilty of contributory infringement. Upon the defendant's demurrer, the bill was dismissed. In reversing this judgment, it was held that:

(1) The owner or assignee of a patent may, during the period of his monopoly, regulate the use to be made of the patented article, and anyone, having notice of such restriction who induces its purchaser to make a different use of the article is guilty of contributory infringement although the restrictive use of the patented article creates a monopoly in an unpatented article; (77 Fed. 294, *et seq.*)

(2) Where a patentee makes a structure embodying his

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invention, and unconditionally sells it, the buyer acquires the right to use the machine without restrictions; (p. 290)

(3) A licensee is one who by contract acquires a right to make, use, or sell machines embodying the invention, the license operating only as a waiver of the monopoly as to the licensee; (p. 290)

(4) The manufacture, sale, and use, of a patented article are all substantive rights and may be granted separately or conferred together by the patentee; (p. 291)

(5) "Neither the patentee, nor the machine involving his invention, nor a license for use, can be exempted from the liabilities and regulations which, in the public interest, attach to all persons and property under the general law of the land, neither is the right to make and sell or use a patented invention or process free from the restraints imposed by the police power of the state;" (p. 293)

(6) "When a patentee authorizes the use of his invention by one charged with public duties, and subject to regulation by law, it is not competent, by a restriction on the use, to deprive the licensee of the power of rendering an equal service to all who apply and tender the compensation fixed by law or regulation for the same service to others;" (p. 293)

(7) An infringement of a patented combination is accomplished when a single element is made or sold with the intent to unite it to other elements and so complete the combination; (p. 297) and

(8) Injunction is a proper remedy to prevent contributory infringement of a patent, when the infringements are numerous and continuous. (p. 301)

NOTE.

Rupp et al. v. Elliott et al., 65 C. C. A. 544, 131 Fed. 730, (U. S. C. C. A., Ohio, 1904) is a parallel case.



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## HERRIMAN v. MENZIES.

(115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81, 1896.)

**Voluntary Associations; Regulation of Prices; Practice.**

A number of firms and individuals, engaged at San Francisco in business of stevedoring, were members of the Master Stevedores' Association, formed "to govern and control the business of master stevedores, to be carried on by its members, and to divide the profits and losses of said business so carried on." The association had power to "fix a schedule of prices or charges for any and all work as stevedores to be done and performed by its members," who were bound to observe and abide by such schedule. By the articles of association to be in force for five years the members agreed to carry on their respective businesses in their own names for the benefit of the association, each member agreeing to do so in an efficient and economical manner and to render to the association at stated intervals correct accounts of the business done. A violation of any of the provisions of the contract subjected the members violating to a certain amount as liquidated damages. It did not appear from this contract, or otherwise, that the parties in the association were in control of the stevedoring business and that the purpose or effect of the association was to prevent general competition or control prices. In an action to dissolve the association and for an accounting, it was held that:

(1) "Combinations between individuals or firms for the regulation of prices, and of competition in business, are not monopolies, and are not unlawful as in restraint of trade, so long as they are reasonable, and do not include all of a com-

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modity or trade, or create such restrictions as to materially affect the freedom of commerce;"

(2) "An agreement between a number of persons to act concertedly in fixing prices at which they will sell a particular product in a particular city is not illegal, as being in restraint of trade, unless it appears that they have a monopoly of that product;"

(3) "A monopoly exists where all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein;"

(4) Under section 940, Code Civ. Proc. (Cal.) a notice of appeal must be served upon every adverse party or one who is interested and would be affected by a reversal of judgment, irrespective of whether such party is plaintiff, defendant or intervener on face of record; and

(5) Section 659, Code Civ. Proc. (Cal.) requires a party intending to move for a new trial to serve notice of his intention upon the adverse party or the one who is interested in the subject-matter of the motion and would be affected thereby.

NOTE.

The last two points of practice were passed upon when the case was first before the supreme court.

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## HOOKER et al. v. VANDEWATER.

(4 Denio, 349, 47 Am. Dec. 258, N. Y. 1847.)

### Illegal Contracts; Maxims; Definitions.

Five of the most important owners of distinct and independent lines of boats entered into an arrangement or contract to establish and maintain uniform rates of freight, to equalize their forwarding business, and to avoid all unnecessary expenses in conducting the same for a limited period. To accomplish these purposes the respective lines were converted into shares of stock, each party being given a certain proportion in the earnings of all the lines computed upon the number of shares of stock allotted to him; a common agent was constituted to whom each party advanced and kept good $35 on each share of stock, and who, from time to time, received from each party returns of business done by his line and adjusted the proportions from the earnings due to each, and out of this common fund paid and liquidated all such sums as appeared from time to time to be due from one to the other. In an action of assumpsit upon this contract for a balance due the plaintiffs from the defendant, the defendant pleaded non-assumpsit. On a reference, the referee found and reported a certain amount due the plaintiffs from the defendant. A motion was then made to set aside this report. In deciding that the referee's report should not be permitted to stand, it was held that:

(1) An arrangement between independent business concerns made to destroy competition between them and to regulate and control rates of freight is an act "injurious to trade" within the legal meaning of 2 R. S. 691, sec. 8, denouncing it as a crime, and is therefore illegal and void;

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(2) The words "trade" and "commerce" are not synonymous, "commerce" relates to dealings with foreign nations, while "trade" means mutual traffic among ourselves, or the buying, selling or exchanging of articles between members of the same community; (4 Denio 353)

(3) Competition is the life of trade; (p. 353)

(4) "A court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land;" (p. 352) and

(5) *Ex turpi causa non oritur actio* (No action arises out of an immoral consideration) is applicable not only when the contract is expressly illegal, but whenever it is opposed to public policy. (p. 352)

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## HOPKINS v. UNITED STATES.

(171 U. S. 578, 43 L. ed. 290, 1898.)

**Interstate Commerce.**

This was a suit under the Sherman Act in which was sought the dissolution of a voluntary association of live stock commission merchants and to enjoin its members from entering into or continuing in a similar combination. The main objects of the association were not to engage in the business itself, but to maintain and uphold a proper way of doing it, to create the means of preserving business integrity in the transaction of business, and to enable its members to better conduct their business as live stock commission merchants in full competition with each other.

The association was regarded as not being in restraint of trade or commerce, because the particular acts complained of consisted in services rendered to and facilities made use of by exporters in the sale of an article in another state which are not interstate commerce within the meaning of said Act.

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## HOUCK v. WRIGHT.

(77 Miss. 476, 27 So. 616, 1900.)

### Contracts, Exclusive Agency; Collateral Attack.

H had the exclusive agency within a prescribed territory for the sale of a certain make of pianos. W ordered a piano from H. In an action for the purchase price of this piano W claimed that his contract with H was void under chapter 140, Code 1892, and therefore refused payment. The trial court gave judgment for the defendant. On reversal of this judgment, it was held that:

(1) A contract between a manufacturer and dealer for the exclusive sale of the manufacturer's goods within a certain territory is not unlawful; and

(2) An otherwise legal contract is unaffected by another collateral contract, which might be illegal.

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## HUNT v. RIVERSIDE CO-OPERATIVE CLUB.

(140 Mich. 538, 104 N. W. 40, 112 Am. St. Rep. 420, 1905.)

**Wholesalers' and Dealers' Associations; Price of Labor; Construction; Practice.**

The Master Plumbers' Exchange was a voluntary association composed of nearly all master plumbers doing business in Detroit, Mich., and vicinity. The Riverside Co-operative Club consisted of master plumbers belonging to said Exchange and all Detroit manufacturers and dealers in plumbers' supplies. Under joint rules and regulations of both clubs, uniform prices for plumbers' supplies and labor of master plumbers were fixed and established; wholesalers were bound to sell only to qualified master plumber members, and master plumbers were required to purchase their supplies exclusively from such wholesalers; a substantial discrimination as to prices was made against non-members; and a heavy penalty was imposed in case of breach of any of the rules and regulations which constituted an agreement between the members of the clubs. On information of a prosecuting attorney, these clubs were restrained from further operation, because they violated anti-trust law of 1899. In modifying the decree it was held that:

(1) An arrangement between wholesalers and dealers in a commodity, under which uniform prices are established and maintained and non-members are discriminated against with reference to such prices, tends to create a monopoly, and is unlawful;

(2) Where a monopoly exists, the fact that prices of the article monopolized have not advanced or that prices have been actually reduced is no defense to a monopoly charge;

(3) Nor is it a defense that the monopoly sought to be sup-

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pressed is incomplete when it is shown that the particular contract or combination tends to monopolize trade or commerce;

(4) An agreement between individual employers and employees, or associations of either, fixing and regulating the price of labor, is not unlawful.

(5) Where a number of agreements are steps to effect the accomplishment of an illegal object, they must be considered together, and not singly; and

(6) An objection that a relator had no authority to bring proceedings on behalf of the people of a state cannot be made for the first time on appeal.

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## INDIA BAGGING ASSOCIATION v. KOCK & CO.

(14 La. Ann. 164, 1859.)

### Trade Restraint.

Eight New Orleans firms in 1856 entered into articles of association whereby they agreed for three months to be governed in the sale of cotton bagging by a majority of the members. A breach of this agreement subjected the offending party to a monetary penalty. The parties composing this association retained their general character as independent firms while the agreement was in force. One of these members withdrew from the association before the expiration of the agreement. Suit was thereupon instituted against him for said penalty. The trial court gave judgment in plaintiff's favor. This was reversed on appeal, the reviewing court holding that:

(1) An agreement or combination to enhance the price in the market of an article of primary necessity is in restraint of trade; and

(2) Courts will not aid combinations which are contrary to public order or policy.

NOTE.

In support of the foregoing propositions the opinion cites: C. C. 1889, 1887; Merlin, Rep. de Jurispr., verbo Monopole; Blackstone's Comm., book 4, chap. 12, secs. 8 and 9; Chitty on Contracts, edition 1855, p. 678; 1st Smith's Leading Cases, 367, 381; French Penal Code, art. 419; Pardessus, Droit Comm., vol 1, p. 265; Lang v. Weeks, 2 Ohio Repts., N. S. 519; Thomas v. Tiles, 3 Ohio, 274.

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## INDIANA MANUFACTURING CO. v. J. I. CASE THRESHING MACHINE CO.

(39 Chi. Leg. N. 309, 154 Fed. 365, U. S. C. C. A., Wis. 1907.)

**Sherman Act, Scope, License Contract; Patents; Jurisdiction; Appeal and Error.**

The construction of a separator includes a stacker. The manufacture of pneumatic stackers commenced in 1891. During that year thirty-six stackers were built into nineteen different makes of separators. About the year 1891 the Indiana Manufacturing Co. acquired the Buchanan and other patents, and commenced the manufacture of pneumatic straw-stackers; and as patents for improvements were issued from time to time, bought them up until it practically owned all of the patents pertaining to the art. In consideration of a certain royalty, the use of all subsequently acquired patents without additional royalty, and the giving of the same favorable terms extended to subsequent licensees, the Indiana Manufacturing Co., in 1892, licensed one of the large manufacturers of threshing machinery to build stackers into their own separators, conditioned upon the maintenance of a fixed price to be marked on the patented article. By 1895 nearly all of the makers of threshing machinery had availed themselves of, and came under this system of licensing, including J. I. Case Threshing Machine Co. During this year the Indiana Manufacturing Co. discontinued manufacturing on its own account to supply the demand for stackers built into old separators, because the different makers were willing to put stackers into old as well as into new separators. The J. I. Case Threshing Machine Co. operated and accounted under said license until 1902, when it refused to further account, and began the manu-

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facture of another make, the Norton stacker, threatening to put the licensor's stacker on the market for less than the agreed price. In a bill by said licensor for an accounting and injunction against the licensee, in addition to the foregoing facts it was alleged that the Norton patent embodied inventions covered by the licensor's patents, that the licensor had built up a valuable property right in its system of licensing, and that the licensee's conduct with the Norton patent would, if persisted in, injure the licensor's patent monopoly. The main contentions of the defendant were that the Norton patent did not embody any of the licensor's inventions, and that the contract with it was a part of a license system violative of the Sherman Act. The lower court dismissed the bill for want of equity. In reversing this decree, it was held that:

(1) It is lawful, under the Sherman Act, for the owner or assignee of a patent to acquire all of the other patents pertaining to a single art and its advancement, in order to control the production and prices of the patented article under a license system, when this is done without the concerted action of all of the licensees;

(2) Unless form, location, or sequence is essential to the result, or indispensable, by reason of the state of the art, to the novelty of an invention a valid patent may be obtained when the act of the inventor consists of picturing in the creative imagination a new result, the new machine for achieving it, and the way to build the machine, rather than of the selection and rearrangement of the elements of the mechanism;

(3) During the relationship of licensor and licensee, the latter is estopped from denying the validity and *prima facie* scope of the patents;

(4) Equity has jurisdiction in granting injunctive relief against infringement of patents; and

(5) Defenses not sustained by evidence, or which, if sustained, are not pleaded, are disregarded on appeal.

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NOTE.

Grosscup, J., concurred in the result because the particular patents involved, in their entirety, constituted "a single mechanical evolution" and were "in no sense * * * competitive patents," saying that he was "not prepared to hold * * * that patented articles are not, under all circumstances, articles of trade or commerce, within the Sherman Act."

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## In re CORNING.
## UNITED STATES v. GREENHUT.

(51 Fed. 205, U. S. D. C., Ohio, 1892.)

**Rebates; Indictment; Federal Practice; Trial.**

An application was made by a district attorney to the United States district court for a warrant to remove certain indicted persons to another district for trial. The persons indicted were residents of the district where the application was made. In denying the application and discharging the defendants, it was held that:

(1) Act of July 2, 1890 (Sherman anti-trust law) does not prohibit the giving of rebates by manufacturers or wholesalers to their dealers on condition that they purchase their entire product exclusively from such manufacturers or wholesalers and sell it at list prices furnished by them when such dealers do not agree to such condition;

(2) In an indictment under the Sherman anti-trust law the specific acts relied upon to make the offense, as well as an unlawful intent, must be charged. Setting forth an unlawful intent, without specific acts constituting a crime, is insufficient;

(3) "Where an offense has been committed in several different districts, and the accused reside in other and different districts, the government has a right to elect in which one of the districts the prosecution may be conducted, and, under proper conditions, may elect to prosecute them in a district other than that in which they or either of them reside;" and

(4) It is the duty of a district judge who has before him an application for a warrant of removal of a person charged with the commission of an offense against the laws of the

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United States for trial to a distant district to scrutinize the indictment and refuse the warrant in case it appears on the face of the indictment that the crime alleged was not committed in the district to which the removal is asked, or that the indictment does not sufficiently charge an offense under the law, or that there are other material defects in that instrument, or in the act upon which it is founded.

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## In re DAVIES.

(168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855; 168 N. Y. 596, 61 N. E. 1128, 1901.)

**Legislative Power; Judicial Acts; Testimony; Appeals.**

By section 4 of 1899 New York anti-trust laws, before bringing an action under them, the attorney-general is authorized to present to a justice of the supreme court an application in writing for an order directing the persons mentioned therein to appear before such justice or a referee designated in such order and answer such questions as may be put to them and produce such papers, documents and books concerning any alleged illegal contract or combination. Whenever a proper showing is made it is the duty of the justice to grant the application, with preliminary injunction, if necessary, and it is the duty of the witness to attend at the time and place designated. Availing himself of this authority, John C. Davies, attorney-general, presented a proper petition to one of the justices of the supreme court for the examination of certain witnesses in regard to an alleged violation by the Knickerbocker Ice Company, the Consolidated Ice Company and the American Ice Company, of said anti-trust laws. An order was accordingly entered appointing a referee and requiring certain parties to appear and furnish testimony. A motion on behalf of one of these witnesses to vacate this order was made. The supreme court denied this motion, but on appeal to the appellate division the order denying the motion by the supreme court was reversed. In reversing the appellate division and affirming the supreme court, it was held that:

(1) A legislature has power to provide for examination of persons in *ex parte* proceedings to ascertain whether or not any of the criminal laws of the state have been violated;

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(2) In making an order for the appearance of witnesses and the production of documentary evidence before a referee, under anti-trust laws of 1899, a judge of the supreme court acts in a judicial, and not ministerial, capacity, as it is necessary to determine from the attorney-general's petition whether the general nature and object of the proposed action is of such character that it is founded upon the statute as well as upon probable cause and that the testimony of the witnesses will be material and necesary therein;

(3) Due process of law is not denied a witness, under said Act, by requiring him, through the judicial department of the state, to be examined in order to ascertain from his testimony whether a judicial proceeding might be instituted against others on behalf of the public;

(4) Where an Act is a substantial re-enactment of a former Act, the last Act will be considered as a continuation of the earlier enactment;

(5) When an appellate court certifies a question of law to a higher court for review, the presumption is that the determination of the case in the appellate court was made upon its merits, unless it expressly appears from the record that such determination was made only in the exercise of discretion; and

(6) An abstract proposition, unsupported by actual facts in a case, will not be passed upon by a reviewing court.

## NOTE.

The foregoing case was decided by a majority of five justices. The dissenting opinion of three justices takes issue on the main question of the case, to wit: whether the procedure authorized by the Act of 1899 constitutes due process of law. This opinion mainly attempts to prove that the case of Interstate Commerce Commission v. Brimson is inapplicable to the case before the court. Admitting this to be true, a clear absence of authority in the legislature to make the provision in question is not satisfactorily shown. Similar provisions to those passed upon in this case were contained in the anti-trust law of 1897. That Act was before



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the supreme court in the case of In re Attorney-General (47 N. Y. Supp. 20, 1897), where a motion to vacate an order entered upon the attorney-general's petition for an order requiring certain parties to submit to an examination was granted. On appeal to the supreme court, appellate division (47 N. Y. Supp. 883, 1897), the order appealed from was affirmed by all of the justices except one, solely on the ground that the petition of the attorney-general was defective. Both majority and dissenting opinions contain sound reasoning in favor of constitutionality of provisions permitting the attorney-general to present an application to one of the supreme court justices and obtain an order for the examination of witnesses preliminary to instituting proceedings under anti-trust laws. The justice dissenting was of the opinion that the application or petition of the attorney-general was sufficient. When an appeal was taken to the court of appeals (155 N. Y. 441, 50 N. E. 57, 1898) the case was dismissed on the ground that the order appealed from was not appealable.

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## In re GREENE.

(52 Fed. 104, U. S. C. C., Ohio, 1892.)

**Habeas Corpus; Statutes; Indictment; Requisites; Exclusive Sale: Rebates.**

An indictment, consisting of four counts, returned to a Massachusetts district court, attempted to charge an offense committed under Act of Congress of July 2, 1890. The first count, stripped of its verbiage, charged "that the defendants, under the form and guise of the Distilling & Cattle Feeding Company, sold on October 3, 1890, to Mills and Gaffield, copartners under the name of D. T. Mills & Co., a certain quantity of distilled products then in the state of Illinois; that, by reason of said Distilling & Cattle Feeding Company's controlling the manufacture and sale of seventy-five per cent of all such products in the United States, they fixed the price at which said purchasers should and did sell said alcohol, for use in Massachusetts, or for transportation into any other state, 'and did compel said Mills and Gaffield, as copartners, to sell said alcohol at no less price than that fixed' by them." The specific acts alleged in the second count, in substance the same as alleged in the third and fourth counts, were "that, on the purchase of said quantities of alcohol by C. I. Hood, and Kelly & Durkee, (citizens and residents of Massachusetts,) in September, 1890, from certain distributing agents of the Distilling & Cattle Feeding Company, the defendants, under the form and guise of said company, agreed and promised that if said purchasers would, for a certain designated period, (six months,) buy all their supply or supplies of distillery products exclusively from said company's distributing agents, (two of whom, as appears in the count, were located at Boston, Mass.,) and would not sell the alcohol or other distillery products so purchased at any lower prices than the list

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prices of such distributing agents, and would make a proper certificate of such facts, then the said Distilling & Cattle Feeding Company would make and pay to said purchasers a rebate of five cents per gallon on each gallon purchased by them." While Greene was being held under warrant from a United States commissioner, awaiting an order for his removal to Massachusetts to answer said indictment, he petitioned a United States circuit court for a writ of *habeas corpus*. On the hearing of this petition Greene was discharged from custody, the court holding that:

(1) In *habeas corpus* proceedings, to release one who is being held under a United States commissioner's warrant awaiting an order for removal under section 1014, Rev. Stat., it is the duty of the judge or court issuing the writ to ascertain from the indictment whether an offense against the United States is charged and whether the court to which the removal is sought has jurisdiction of the same;

(2) An Act of Congress will not be given a retroactive effect;

(3) Where a statute does not fully, directly and clearly set forth all the elements necessary to constitute the offense intended to be punished, an indictment merely following the language of the statute is insufficient;

(4) "Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute;"

(5) The promise of a rebate as an inducement for exclusive trading is not unlawful when the purchaser is left at liberty to buy where he pleases, and when all other sellers of the article are left unrestrained in offering the same, or greater, inducements;

(6) A stockholder of a corporation is not criminally responsible for violation of a statute by his corporation; and

(7) The acts charged in any of the counts of the indictment did not constitute such an offense as is created by the Sherman anti-trust law.

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## In re JACKSON.

(107 N. Y. Supp. 799, 1907.)

**Statutes, Repeal; Telegraph Companies.**

In an application under the Donnelly anti-trust act it was alleged that the attorney general intended to begin an action under said act against the Postal Telegraph & Cable Company and the Western Union Telegraph Company, domestic corporations, to restrain them, their officers, or their agents from doing certain acts; that said companies had entered into an agreement to charge rates mutually agreed upon for the transmission of telegrams; that by the establishment of said rates the charge for transmission had been materially increased by said companies; that they had agreed to establish at certain common points of service in New York state common offices and agencies for the receipt and transmission of messasages, under an agreement for a division of the receipts and profits from said business; that they had agreed to divide equally between them the gross proceeds of certain business; and that said contracts and agreements constituted an arrangement and combination whereby a monopoly in the receipt, transmitting, and delivery of telegrams in said state was maintained, and whereby competition in said state in said business was prevented. The petition then prayed, as preliminary to bringing said action, for orders directing various persons who were officers and directors of said companies to appear before a referee to testify regarding said contracts and arrangements, and to produce before the referee various contracts, records, books, and papers of said companies which contained evidence of the terms of said contracts and combination. Upon the entry of orders in accord-

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ance with said prayer, the respondents moved for their vacation. In granting said motions and setting aside said orders, it was held that:

(1) The service or labor of transmitting telegrams is not such a "commodity" as is contemplated by the Donnelly anti-trust act, the object of which is to prohibit monopolies in tangible articles of trade and commerce in common use and such as are capable of manufacture, production, and sale;

(2) The Donnelly anti-trust act did not repeal the laws relating to telegraph companies;

(3) "A special act will not be deemed repealed by implication in consequence of the passage of a general law containing a general repealing clause of inconsistent legislation;" and

(4) Telegraph companies in the state of New York are protected by special statutes and enjoy special rights, powers, and privileges.

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## INTERNATIONAL HARVESTER COMPANY OF AMERICA v. COMMONWEALTH.

(—— Ky. ——, 99 S. W. 637, 1907.)

**Appeal and Error; Statutes, Extraterritorial Effect; Pleading; Practice.**

The defendant was indicted under section 3915, Ky. Stat. 1903, the indictment charging the offense in the words of the statute. This statute declares it a criminal conspiracy for any domestic or foreign corporation to create, enter into, become a member of, or a party to, or in any way interested in any pool, trust, agreement, etc., with any other corporation, etc., for the purpose of regulating or controlling the price of merchandise, or limiting the production of the same. There was a plea of "not guilty" to this indictment. A trial resulted in a verdict and judgment against defendant for $2,000. On appeal this judgment was affirmed, the court holding that:

(1) Evidence showing the existence of active competition in the state between six independent companies, a subsequent sale by one of these of its business to a new company, the giving by the new company to one of its general agents in the state the exclusive handling of all of the articles or machinery previously sold by the six different companies, the entering into commission contracts by the new company with sub-agents in the state assigning to each agent exclusive territory and binding him to sell only at uniform prices fixed by the company for the sale of the article or machinery and on terms and conditions made by it, is sufficient to support a finding by a jury that the new company entered into an agreement with the six companies, or any one of them, to fix

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prices etc., contrary to the anti-trust provisions of the state; (99 S. W. 638, *et seq.*)

(2) In Kentucky the slightest evidence in support of the verdict precludes further inquiry by an appellate court; (p. 638)

(3) Where there is any evidence which, standing alone or considered apart from opposing evidence, is, if believed by the jury, legally sufficient, or which might reasonably tend to support the verdict, though such evidence may not be of an entirely certain and satisfactory nature, it will not be disturbed, for upon the mere weight of evidence the jury are the judges, and though the evidence would not have satisfied the mind of the appellate court upon an original investigation, it will not sit to weigh conflicting testimony; (3 Cyc. 348)

(4) The Kentucky anti-trust provision, making it unlawful for anyone to enter into, become a member of, or a party to any pool, trust, etc., to fix prices at which property may be sold in said state, and to limit the production of the same, does not apply to conspiracies entered into outside of the state, unless some overt act is committed within the state; (99 S. W. 639)

(5) Where a criminal conspiracy is entered into affecting one county or place, the illegal agreement constitutes the crime, and is punishable in that place only, and no overt act need be shown to authorize a conviction, but where such conspiracy is formed in one county or place and is carried out in another, an overt act must be shown, and it is not necessary to prove any express renewal of the illegal agreement, it being considered in law that wherever any one of a number of co-conspirators commits an overt act in furtherance of the common design, the illegal agreement is thereby renewed or continued as to all of the conspirators; (p. 639)

(6) Section 3915, Ky. Stat. 1903, being descriptive of the offense charged, an indictment drawn in the words of the statute is sufficient; (p. 637½)

(7) "Where the words of the statute are descriptive of the offense, the indictment will be sufficient if it follows the language of the statute;" (p. 637½) and

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(8) Under sec. 125, Criminal Code, an error made in the name of the defendant may be corrected on the record of the court at any time "before execution," and by sec. 457 Ky. Stat. 1903 and sec. 732 Civil Code Practice, sec. 125 of the Criminal Code is applicable to corporations. (p. 638)

NOTE.

The doctrine expressed in paragraph 2 is not in the court's opinion of the case, but was involved in its decision. This doctrine however should not have been applied to a criminal proceeding.

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## INTER-OCEAN PUBLISHING CO. v. ASSOCIATED PRESS.

(184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184, 1900.)

**Corporations, By-Laws; Public Use in Private Property; Injunction.**

The objects for which the Associated Press was organized were "to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same; to purchase, erect, lease, operate and sell telegraph and telephone lines and other means of transmitting news; to publish periodicals; to make and deal in periodicals and other goods, wares and merchandise." Under the by-laws of this association news could be furnished by and to owners of newspapers, whether stockholders or not, but only to those who were not antogonistic to the association. The Inter-Ocean Publishing Co. entered into a contract with the Associated Press to obtain certain news. This contract embodied provisions restricting parties from making use of news furnished or received in a certain manner in accordance with said by-laws. After the execution of this contract, the Inter-Ocean Publishing Co. found it necessary, for the advancement of its business, to obtain a particular kind of news from other sources. Being threatened by the Associated Press with the enforcement of said by-laws, the Inter-Ocean Publishing Co. brought a bill in equity for an injunction. The trial court dismissed this bill for want of equity. In the appellate court this decree was affirmed. On appeal to the supreme court both judgments were reversed and a decree, as prayed in the bill, ordered to be entered, the reviewing court holding that:

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(1) The legal character of a corporation is determined by the purposes for which it was created, and not by the powers it is exercising;

(2) When private property is so used as to impress it with a public interest, such interest is subject to public regulation;

(3) A private corporation or person owing a public duty cannot avoid it by contract;

(4) A private corporation owing a public duty has no power to pass or enforce a by-law upon its stockholders or members concerning such duty which has the effect of restricting trade and commerce, and preventing competition; and

(5) Equity has jurisdiction to restrain a private corporation, at the instance of one of its stockholders, from enforcing an illegal and void by-law which is in restraint of trade or commerce upon a showing that irreparable injury and damage will result.

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## JACK v. STATE.

(26 Sup. Ct. Rep. 73, 199 U. S. 372, 50 L. ed. 234, Kan. 1905.)

### Constitutional Law; Statutes; Immunity.

Section 10, chapter 265, Kansas Laws 1897, authorizes a county attorney or an attorney-general to make application to any of the district courts, or judges thereof, for subpoenas of witnesses, and it is made the duty of such courts, or judges, when good cause is shown, to grant subpoenas for such witnesses who are required to appear and testify with reference to any violation of said Act. Such witnesses are declared to be free from any criminal prosecution for violation of the Act on account of so testifying. An application was made under said section by the attorney-general and county attorney to a proper court for the examination of certain parties with reference to an alleged violation of the anti-trust laws by persons engaged in the operation of coal mines. On granting the application a subpoena issued and was served upon one of said parties. He appeared before the court and moved to quash the subpoena. On overruling his motion he refused to answer questions, claiming that his answers would incriminate him. This was declared to be no excuse, and still refusing to answer, he was committed to jail for contempt of court. He appealed to the state supreme court, where the judgment of the lower court was affirmed. On a writ of error from the United States supreme court it was held that:

(1) A provision granting immunity from prosecution in the same jurisdiction on account of self-incrimination is sufficient;

(2) The construction given by the highest court of a state with reference to the constitutionality of its statutes is binding upon Federal courts; and

(3) The first ten amendments to the Federal constitution operate solely on the national government.

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## JACKSON v. STANFIELD.

(137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588, 1894.)

**Conspiracy in Restraint of Trade; Damages, Mitigation of.**

The Retail Lumber Dealers' Association of Indiana was organized in 1889, for the purpose of protecting its members against sales by wholesalers and manufacturers to consumers. Only such persons could become members who were "regularly in the retail lumber trade, owning or operating a lumber yard, in which a general assortment of stock, in kind and quantity commensurate with the demands of the community where located," was kept for sale. Lumber manufacturers or wholesalers could become honorary members. Under this association's by-laws, whenever a lumber manufacturer or wholesaler, whether an honorary member of the association or not, sold lumber to a non-member, the regular dealer whose territory was encroached was authorized and required to make claim against such manufacturer or wholesaler for amount of the sale or shipment. When such claim could not be adjusted by the parties themselves, the injured member was required to call upon the executive committee of the association. This committee had the power to hear and determine disputed claims and to enforce penalties. Upon a manufacturer's or wholesaler's failure to abide by the decision of the executive committee, the association's secretary was required to notify all of its members of this fact. Subsequent dealing with such manufacturer or wholesaler by members was cause for expulsion from the association. In 1889 this association had a membership of over 150. Jackson was engaged in buying and selling lumber by negotiating sales as agent for a wholesaler and receiving a commission therefor, without owning the lumber himself. In October 1889 Jackson negotiated, for this wholesaler, a sale of lumber to a con-

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sumer and collected his commission. On account of this sale, at the instance of a regular dealer, whose territory was invaded, the wholesaler was fined $100 by the association, which fine the wholesaler paid. Afterwards Jackson attempted to make a second sale of lumber for said wholesaler to another consumer. The wholesaler refused to consummate this sale for the reason that he was subject to another fine. Jackson thereupon turned this consumer over to the wholesaler and was thereby deprived of the commission or profit from such sale. Not being able to conduct business any longer, Jackson, before commencing an action, requested the defendants to abandon their policy concerning him. This the defendants refused to do. Thereupon Jackson commenced an action against two of the members of the association for damages on account of the loss of his commission or profits from said sale, and for an injunction. The trial court found for the defendants. In reversing this judgment and granting the relief asked for by the plaintiff, it was held that:

(1) "A conspiracy formed and intended, directly or indirectly, to prevent the carrying on of any lawful business, or to injure the business of any one, by wrongfully preventing those who would be customers from buying anything from the representatives of such a business by threats or intimidation, is in restraint of trade and unlawful;"

(2) "Where the policy pursued against a trade or business is of a menacing character, calculated to destroy or injure the business of the person so engaged, either by threats or intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil action for damages therefor;"

(3) No recovery can be had for remote damages; and

(4) Where there exist circumstances in mitigation of damages it is incumbent upon the defendant to show such circumstances.

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NOTE.

On petition for a rehearing (37 N. E. 14) a modification of the special finding as to damages was requested because it did not appear whether the damages awarded were on account of loss of commissions or profits. This objection was overruled on the ground that the loss sustained appeared from the evidence sufficiently definite and certain. Another objection urged was that the contract which the plaintiff turned over to the wholesaler was void under the statute of frauds because the value of lumber involved exceeded $50. This was answered by stating that a third person cannot interpose the statute of frauds to overthrow a transaction between other persons. A third objection made was that unearned commissions or profits could not be made the subject of an action. The answer to this objection was that as an aid in estimating damages, but not as a measure of damages, probable profits, not remote nor speculative, may be proved and taken into consideration by the jury. The petition for a rehearing was therefore overruled.

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## JOHN D. PARK & SONS CO. v. HARTMAN.

(153 Fed. 24, U. S. C. C. A., Ky. 1907.)

**Trade Secrets, Monopoly; Patents; License Contracts; Trade Marks; Sales, Restrictive; Restraint of Trade; Actions; Pleading.**

The owner of a secret formula for the manufacture of certain medicines established his business through a contract system consisting of two separate agreements. One of these contracts was between the manufacturer and jobbers or wholesalers of drugs requiring them to sell at uniform prices only to such retailers as were designated by the manufacturer. The other agreement was between the manufacturer and retailers obligating the latter to sell only to consumers at prices fixed by the manufacturer. To insure compliance with these agreements and facilitate discovery of their violation, each jobber or wholesaler was required to report each sale to the manufacturer, and a retailer was required to stamp or write his name on each bottle or package sold. A certain wholesaler refusing to enter into contract relations with this manufacturer, and having obtained his remedies and medicines from unlicensed retailers, the manufacturer filed a bill against this wholesaler for an injunction and accounting. The bill, among other things, alleged that there existed between the defendant and others a combination to obtain unlawfully and fraudulently the complainant's remedies and medicines, and after destroying all identity of the complainant's medicines to resell them at reduced prices; that the defendant bought from vendors who knew this fact and who thereby breached their agreement not to sell to unlicensed

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dealers; that the complainant and a majority of the wholesale and retail druggists of the United States had entered into the designated system of contracts, and that the defendant's methods, etc., would cause complainant irreparable injury and damage. A general and special demurrer to this bill was overruled, and an interlocutory injunction was granted in the terms of the bill. In reversing the lower court it was held that:

(1) A system of contracts obligating a manufacturer of an article under a secret process to sell it at one price only and to such persons as enter into contract relations with him, whereby a majority of wholesalers or jobbers in the United States covenant to sell such article at prices fixed by the manufacturer to no one except those licensed by him, and whereby a majority of the retailers in the United States agree not to purchase such article except under license from the manufacturer conditioned upon its resale at uniform prices, destroys competition and is unlawful; (p. 42)

(2) An agreement forming part of a general unlawful scheme is invalid, although the contract standing alone might be valid; (p. 41)

(3) The principle exempting from the common law rules against monopoly and restraint of trade and the provisions of the federal anti-trust act does not extend to *articles* made under a secret process or private formula, there being a special property in trade secrets only in so far as they may be betrayed by persons sustaining contractual or confidential relations; (pp. 29, 30, 32)

(4) The owner of a trade secret has a monopoly in its use only so long as he can preserve secrecy, the public being free to discover such secret by fair means, and when discovered anyone has the right to make use of it; (pp. 29, 30)

(5) A secret process and the article produced thereby are susceptible of distinct ownership and are governed by different rules; (p. 32)

(6) Contracts restraining subsequent resale or use of a



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patented article are neither within the Sherman Act nor the rules of the common law against monopolies and restraint of trade; (pp. 27, 28)

(7) The fact that an article is protected by a trade mark or trade name does not exempt it from being subject to the provisions of the Sherman Act or from the common law rules against monopolies and restraint of trade; (p. 38)

(8) Whenever under a contract the general property in chattels, as well as the possession, passes, the transaction constitutes a sale; (p. 38)

(9) A covenant not to resell an article except at a certain price is not binding upon a third person, although he has notice of such covenant; (p. 40)

(10) "A contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice;" (p. 39)

(11) General restraint in the alienation of chattels, except when a very special kind of property is involved, is generally void; (p. 39)

(12) All agreements or combinations in general restraint of trade are prohibited, regardless of the fact that they prevent only injurious competition and only result in the maintenance of reasonable prices; (p. 45)

(13) "A partial restraint of competition may be upheld when one sells a business or other property, provided it is no greater than is necessary to enable the vendor to realize the value of his good will, or to secure to the buyer the enjoyment of his purchase, or to prevent the use of the property to the prejudice of the seller;" (p. 44)

(14) "Restraints which might be upheld if ancillary to some principal contract cannot be enforced if, when unmasked, they appear to be the main purpose of the contract and not subordinate;" (p. 45)

(15) The validity of a contract in partial restraint of trade is to be determined by whether or not it is ancillary to the principal purpose of the agreement, and is necessary to

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the protection of the interest of the parties in whose favor it is made to operate; (p. 41)

(16) By granting a license to make use of and sell under a patent, a contract is created between the patentee and licensee, which, upon infringement, may be made the basis for an action in tort, or for breach of contract; (p. 27) and

(17) In a bill to enjoin the violation of a contract in partial restraint of trade, there must be alleged facts from which it can be determined whether the contract or covenant is necessary and reasonable. (p. 44),

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## JUDD v. HARRINGTON.

(139 N. Y. 105, 34 N. E. 790, 1893.)

**Illegal Combinations; Contracts; Practice; Actions.**

Certain brokers and dealers in sheep and lambs organized an association for the declared purpose "of guarding and protecting their business interests from loss by unreasonable competition," and agreed to pool their commissions, except such as should be agreed to be paid to a certain butchers' association. The association so formed afterwards entered into an agreement with the butchers' association, whereby the brokers were to sell only to the butchers, and the butchers to buy only of the brokers belonging to their respective associations. The agreement provided for a system of accounting and stipulated damages in case of its violation. An action brought by the treasurer of the brokers' association against one of its members to recover stipulated damages for a breach of said agreement resulted in defendant's favor. In affirming this judgment, it was held that:

(1) An agreement entered into for the purpose of creating a combination between the sellers and buyers of a commodity in order to control the market, fix prices, and destroy competition, tends to enhance prices, is detrimental to public interest and void as against public policy; (139 N. Y. 109)

(2) Where the legal character of an agreement appears upon its face, the validity of such an agreement is a question of law and not of fact; (p. 110)

(3) Where several agreements are entered into to carry out one object or scheme, in determining the legality of such an object all of the agreements are to be considered as one contract or transaction; (p. 109) and

(4) Contracts in contravention of public policy are absolutely void and unenforcible; (p. 110)

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## KANSAS v. SMILEY.

(65 Kan. 240, 69 Pac. 199, 67 L. R. A. 903, 1902.)

**Public Policy; Statute, Construction; Practice.**

All the grain buyers at a certain Kansas town were in an arrangement with the secretary of the Kansas State Grain Dealers' Association to divide the grain trade at that place between them in order to prevent competition and to pool the profits of the grain trade. Under said arrangement a dealer was at liberty to buy as much grain and to pay for it at such prices as he chose; but if he made such purchases, he had to pay to the others three cents per bushel for a certain excess of the grain so bought. In a criminal prosecution, brought under the 1897 anti-trust act, against S, the secretary of said association, he was charged with conspiracy to prevent competition and to pool and fix the price of grain bought and sold on the general market. On being convicted and sentenced, he took an appeal. In affirming the judgment, it was held, by a majority of six justices, that:

(1) An arrangement between all the dealers in a certain commodity at a particular place or market, for the purpose of preventing competition between them and of fixing and maintaining prices, is within the prohibition of 1897 anti-trust law;

(2) "The courts may determine without previous legislative declaration that a particular agreement is contrary to public policy, and therefore non-enforcible, but they cannot adjudge, in opposition to a legislative declaration that a general class of agreements is opposed to the rules of public policy, that such is not the case;" (65 Kan. 263)

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(3) Where some portions of a statute are valid and others invalid, only the invalid parts are without legal efficacy, except where the void and valid parts of such statute are so connected with each other in the general scheme of the act that they cannot be separated without violence to the evident intent of the legislature, in which case the whole act falls; (p. 247)

(4) General words of statutes are to restricted in import and application whenever the taking of them in a literal sense would lead to absurd or hurtful consequences, or whenever the taking of such words in their full signification would expose them to conflict with the organic law; (p. 249)

(5) General words employed in statutes should be restricted in application to cases presumptively within the legislative intent; (p. 256)

(6) Only those to whom an enactment applies, and against whom attempts to enforce it are made, can interpose constitutional objections to its validity; (p. 247) and

(7) In criminal, as well as in civil, cases harmless errors cannot be made the basis for reversal. (p. 267)

NOTE.

A dissenting opinion in this case argues: (1) that the act involved could not be separated by *construction* so as to give effect to the constitutional portion and disregard the unconstitutional part, contrary to the principle that such separation of a statute cannot be accomplished by limiting its operation but the bad must be separable from the good part of the statute; (2) that the arrangement in question was not unlawful at common law; and (3) that courts and not legislatures are the ones to declare and establish the public policy of a state. The distinction between acts of Congress and state legislation—the one having a limited power, the other being unlimited within the state—is ignored entirely. When confined to the facts before the court the majority opinion is correct on principles. In this case there was beyond question a common law conspiracy to restrain trade. All that was necessary was to hold as constitutional that part of the

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act which inflicted a penalty for violation of the unlawful arrangement at common law. As to the broad principle of liberty of contract discussed in this case, no one will doubt, from a careful reading of the main and dissenting opinions, that should any proper person be aggrieved by an improper enforcement of said statute, many of its provisions might yet be declared as repugnant to some of the provisions of State and Federal constitutions. This case was affirmed by the United States supreme court as Smiley v. State, 25 Sup. Ct. Rep. 289, 196 U. S. 447, 49 L. ed. 546, Kan. 1905.

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## KELLOGG et al. v. SOWERBY et al.

(— N. Y. —, 83 N. E. 47, 1907.)

**Proof; Misdemeanors; Competition; Actions.**

About twenty owners of grain elevators, the elevators being known as rail elevators on account of their railroad facilities, constituting all but one of the elevator owners at the Buffalo port, formed, in 1900, a pool, trust or combination for the purpose of receiving and distributing the net receipts for the elevating of grain coming into said port for delivery to any one of the rail elevators according to an established schedule of percentages based upon the estimated capacity, equipment, value, etc., of each elevator, and not entirely dependent upon the amount of grain actually elevated by it; so that in some cases an elevator might do little or no business during the year and yet receive a substantial percentage of the profits earned by the other elevators belonging to the association. The plan of the combination was carried out by all the owners of elevators devoting their respective properties to the purposes of said association, by elevating all grain consigned to any of such elevators at certain fixed prices, and by distributing the net profits of such elevating among the elevator owners in accordance with an agreed rate of percentages. As part of the same scheme, certain railroads entered into agreements with the association members for the payment of a certain amount per bushel on all grain transported by them coming into said port, whether the grain was directed to any member of the association or not, thereby discriminating against non-members of the association. During the formation of said association and the making of said contracts with the railroad companies, Kellogg and another owned and operated an elevator in the vicinity

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of said association members. Some of the members of said association, prior to its organization, made several unsuccessful attempts to induce Kellogg and the other to join them. In July, 1900, claiming to be injured by said association's methods of doing business, Kellogg et al. brought an action of conspiracy against Sowerby et al., among other things alleging that the kindred agreements with the other elevator companies were entered into as part of an unlawful combination and conspiracy to injure and prevent plaintiffs from doing business; that the combination worked an unlawful discrimination against plaintiffs because the railroad companies refused to carry grain received through their elevator except upon the condition that the shippers should pay a certain amount per bushel as an additional charge; and that plaintiffs were prevented and would be prevented from elevating many millions of bushels of grain and from receiving the elevator charges, etc., to their damage in the sum of $100,000. Upon the trial of the case the defendants offered evidence disproving any intention on their part to injure plaintiffs, but the court refused to admit said evidence, the trial resulting in a judgment for plaintiffs. In reversing said judgment and ordering a new trial it was held that:

(1) To sustain an action for damages, under section 168, subdivision 6, Penal Code (N. Y.), proof of an intent to injure the plaintiff is necessary;

(2) As to the parties to a combination in restraint of trade, the combination is unlawful under the laws of New York whenever it is designed to prevent competition, and has that effect, regardless of the intent of the parties to it, but as to third parties claiming special injury from such combination, an intent on behalf of the members of the combination to injure such parties is essential;

(3) It is a misdemeanor under the laws of New York for two or more persons to conspire to commit any act injurious to trade or commerce;

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(4) "The prevention of competition in business is an act injurious to trade in contemplation of law;"

(5) "A civil action is maintainable, by one who suffers injury as the result of a conspiracy forbidden by the criminal law, to recover the damages which he has sustained at the hands of the parties to the combination;" and

(6) "The gist of the action is the alleged conspiracy in restraint of trade."

NOTE.

The foregoing case was before the supreme court, appellate division, fourth department, 70 N. Y. Supp. 237, 1901, on demurrer to the complaint. That court held the complaint, with its inferences and charges, to contain sufficient facts to enable the plaintiffs to give proof in support of the charge that the agreement was entered into for the purpose of accomplishing an unlawful combination against plaintiffs.

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## KEVIL v. STANDARD OIL CO.

(8 Ohio N. P. 311, Super. Ct. Cin. 1900.)

**Contracts; Trade Restraint; Pleading.**

Previous to 1898 K was conducting a profitable oil business in Kentucky. In consideration of abandoning this business S (a corporation) contracted with K to employ him within a reasonable time at a reasonable salary, agreeing to pay him a stipulated amount until such employment was provided. K abandoned his business and disposed of his property. S paid said stipulated amount for a few months and then discontinued to do so. S also failed to employ K. K brought an action for breach of this contract, setting up that S was a party to an illegal trust or combination. In overruling a demurrer to the petition it was held that:

(1) An agreement for the employment of a person on condition that he abandon his business where the restraint is merely ancillary to its main purpose is not within anti-trust law of 1898 nor against public policy;

(2) Where only one of the parties to a contract enters into it for an illegal purpose, the contract is not thereby invalidated, if otherwise legal, because such intention, to invalidate the contract, must be mutual; and

(3) Allegations in a pleading will be rejected as surplusage when they refer to matter unconnected with the litigated parties.

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## KIMBALL v. ATCHISON, TOPEKA & SANTA FE RAILROAD CO.

(46 Fed. 888, U. S. C. C., Mo. 1891.)

**Railroads; Corporate Stock Ownership.**

The St. Louis & San Francisco Railway Company, called the Atchison Company, a Missouri corporation, operated and managed the St. Louis, Kansas City & Colorado Railroad, extending from St. Louis to Union, Missouri, and used as a suburban road. The Atchison, Topeka & Santa Fe Railroad Company, called the Frisco Company, a Kansas corporation, managed and operated two railroads in Missouri, one from Kansas City northeastwardly through the state to Chicago, and another from St. Louis to Union, Missouri—a distance of about sixty miles. The Colorado and Frisco roads did not touch any two common points, and between the two roads, for more than forty miles, the Missouri Pacific Railroad was interposed. Before purchasing certain shares of Frisco stock, the Atchison Company had in view the construction of one of its Missouri roads beyond Union. Upon the purchase of said stock the construction of said road was abandoned. In an action by stockholders of the Frisco Company to restrain the Atchison Company from voting the Frisco stock, on the ground that its acquisition was in contravention of section 2569, Rev. St. Mo. (Laws 1887, p. 102), and section 17, article 12, Const. Mo., a motion for a preliminary injunction was overruled, the court holding that:

(1) The purchase or acquisition by a foreign railroad corporation of all or a controlling portion of the capital stock of a non-competing railroad company is not within the constitutional or statutory provisions prohibiting the leasing,

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purchasing, managing, or in any way controlling, of a competing or parallel railroad within the state;

(2) Section 2569, Rev. St. Mo. (Laws 1887, p. 102), applies to railroads which are owned, operated or managed within the state; and

(3) Section 2569, Rev. St. Mo. (Laws 1887, p. 102), forbids the acquisition by one railroad corporation of a controlling portion of the capital stock of another competing railroad company only when both railroad corporations are substantial competitors.

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## KINNER v. LAKE SHORE & MICHIGAN SOUTHERN R. R. CO.

(13-23 Ohio Cir. Ct. Rep. 294, 1902.)

**Injunction; Trust Defense.**

To meet the occasion of 1901 encampment of the Grand Army of the Republic, the Lake Shore & Michigan Southern Railroad Company issued a number of special round trip tickets, good only between two certain points, containing a contract between the passenger and the railroad company that the passenger shall not transfer such ticket to any other person or use it for any other purpose than that for which it was issued. Notwithstanding said contract, many ticket holders, after their arrival at the place of encampment, attempted to dispose of their tickets to ticket brokers. The Lake Shore & Michigan Southern Railroad Company thereupon brought an action to restrain such ticket brokers from dealing in said tickets. A preliminary injunction having been granted, the defendants moved for its vacation. This motion was overruled. The defendants then answered stating that said railroad company, in conjunction with about twenty other railroad companies, entered into a combination and conspiracy to suppress competition among themselves in the business of transporting passengers to and from said encampment; that this was accomplished through what is known as the "Central Passenger Association;" and that this association held meetings at which rates were fixed and forms of tickets agreed upon, by all the companies to such combination, for transporting passengers to and from said encampment, contrary to the laws of the United States and the state of Ohio. Each railroad separately issued said tickets, and the contract of the passenger was with the

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particular road over which he traveled and no other railroad or association whatsoever. At the trial the defendants could not connect the Lake Shore & Michigan Southern Railroad Company with said association. A permanent injunction was thereupon granted. In affirming the lower court, it was held that:

(1) Unless a contract is itself unlawful, a court of equity will grant injunctive relief where one is not a party to the contract, but is seeking to induce others to violate the same and, to accomplish that end, must do a wrong that is offensive to a court of equity and which amounts to a crime;

(2) The mere fact that one of the contracting parties may constitute an unlawful combination cannot be invoked collaterally to defeat an action upon an independent contract;

(3) The maxim that a person must come into a court of equity with clean hands is confined to wrong-doing affecting directly the particular matter in litigation, and does not extend to any wrong-doing or misconduct unconnected with the litigated matter and with which the opposite party has no concern; and

(4) The maxim that a person must come into equity with clean hands is not available to one seeking evasion of the law.

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## KLINGEL'S PHARMACY OF BALTIMORE CITY v. SHARP & DOHME et al.

(39 Chi. Leg. N. 124, 104 Md. 218, 64 Atl. 1029, 7 L. R. A. (N. S.) 976, 1906.)

**Common Law Conspiracy; Damages; Parties to Actions.**

In an action for damages against C, S and B it was alleged that B, a corporation, was organized for the purpose, among other things, of unlawfully maintaining among retail and wholesale dealers in drugs the maximum rate schedule of prices, and of preventing, by threats, blacklisting and boycotting, all vendors of drugs and druggists' supplies who were unwilling to submit to the prices so fixed by it from buying at any price the drugs and druggists' supplies needed by them in their business; that the plaintiff had steadily refused to become a member of said association, or to unite with it and with its members in said combination and conspiracy; that though the plaintiff had repeatedly applied to C and S and to sundry other druggists for drugs and druggists' supplies, offering to pay cash, yet the said defendants had refused to sell to it drugs or druggists' supplies at any price whatsoever; that the avowed object of the conspiracy was to maintain in restraint of trade a maximum price of drugs and druggists' supplies, and to compel the plaintiff to become a member of said combination or to be driven out of business; that the membership of the retail drug association was wholly composed of such vendors; that the wrongful refusal of C and S and of others to sell to the plaintiff was the direct result of said unlawful combination; that the action of the defendants was not taken by them in the *bona fide* exercise of their supposed right to sell or to refuse to sell to whomsoever they pleased, nor in the *bona fide* exercise of their supposed right to advise others as to selling or not selling their drugs and druggists' supplies; and

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that the injury to the business of the plaintiff was the direct result of said illegal, malicious and wrongful conspiracy. A demurrer to the complaint was sustained. In reversing the judgment thereon it was held that:

(1) A combination formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them, by means of threats and intimidations, of the right to conduct the business in which they are engaged according to the dictates of their own judgment, is unlawful at common law; (64 Atl. 1032)

(2) A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief; (p. 1030½)

(3) "Where the direct and immediate effects of a contract or combination among particular dealers in a commodity are to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity;" (p. 1030½)

(4) An act performed in furthering an unlawful enterprise is unlawful though the same act would be free from censure if done with some other view; (p. 1031½)

(5) "The intent or knowledge with which an act is done may make a lawful act unlawful;" (p. 1031½)

(6) When threats are effective in accomplishing the result intended to be attained by a conspiracy, they amount to overt acts; (p. 1033).

(7) A threat, coupled with damage necessarily flowing from it in the prosecution of a conspiracy to do an unlawful thing, is sufficient to constitute a good cause of action; (p. 1033) and

(8) A person or corporation used as an instrument in the consummation of a conspiracy in restraint of trade is a necessary party to an action for damages sustained through such conspiracy. (p. 1033)



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## LAFAYETTE BRIDGE CO. v. CITY OF STREATOR.

(105 Fed. 729, U. S. C. C., Ill. 1900.)

### Trust Defense; Practice; Vacating Prior Ruling.

To a declaration of assumpsit consisting of the common and special counts based upon contract for the building of a bridge, the defendant pleaded the general issue and several special pleas. By these pleas it was claimed that the contract was void: (a) under Illinois anti-trust acts of 1891 and 1893; (b) on account of a conspiracy between plaintiff and certain aldermen to prevent competitive bidding; (c) because the bidding did not follow the proper plans; and (d) on the ground that the contract was secured through bribery. Special demurrers were interposed to all of the pleas. On a hearing of these demurrers the only contention made was that the Acts of 1891 and 1893 were unconstitutional. These demurrers were overruled and the plaintiff was permitted to reply double. Several replications were filed, the first one of which set up certain matters as an estoppel *in pais*. The defendant demurred to all of these replications. In overruling the demurrer to the first replication and carrying back the other demurrers to the defendant's pleas, it was held that:

(1) The defense provided for by section 10 of Illinois 1893 anti-trust act can be availed of in a collateral proceeding only after the fact that the plaintiff constitutes an unlawful trust or combination has been established in a direct proceeding;

(2) Section 10, Illinois 1893, anti-trust act, involves the application of a remedy and not a substantive right;

(3) "Federal courts place such construction upon matters of law of a general nature . . . as to them may, under the

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particular circumstances of any given case, seem best calculated to accomplish the ends of justice;" and

(4) Where a decision of each subsequent step in the litigation depends upon a fundamental proposition which has been clearly misconceived at a former hearing of the case, a court of co-ordinate jurisdiction, at a subsequent hearing, to promote justice between the parties, will vacate and set aside a prior ruling.

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## LANGDON et al. v. BRANCH et al.

(37 Fed. 449, 2 L. R. A. 120, U. S. C. C., Ga. 1888.)

**Construction Contracts; Trusts; Corporate Stock Ownership; Jurisdiction; Parties; Pleading.**

On March 18, 1887, McKetchney contracted with the Savannah, Dublin & Western Short-Line Railway Company to build, construct and equip a railroad from Savannah to Macon, in consideration of said company's depositing with him all its capital stock, except $60,000, its $3,000,000 mortgage bonds, its local aid, and all bonds to be issued on a certain portion of said road, all of which was to be held by him as security for his outlay in the building of said road, with full power to sell or pledge the same to secure funds for its construction. The next day McKetchney assigned this contract to the United States Construction & Improvement Company in consideration of nine hundred and forty-six shares of its capital stock and $2,700 cash. On the same day the Construction Company entered into several supplemental agreements with the Short-Line Company whereby the former undertook to pay for the latter $48,169.87, to be regarded as part of cost of construction of said railway. On March 22, 1887, Thomas P. Branch and James A Simmons, who were the organizers of the United States Construction & Improvement Company, agreed to pay a portion ($19,292) of the Short-Line Company's indebtedness, which was assumed by the United States Construction & Improvement Company, claiming themselves to be the owners of the nine hundred and forty-six shares of the capital stock issued to McKetchney, and stipulated, as joint owners of said shares, that five hundred and ten of these shares should be evidenced by one certificate issued to and voted by

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them jointly, and that the remaining four hundred and thirty-six shares should be issued to and voted by Branch and Cornelius V. Sidell. Branch and Sidell afterwards disposed of their interests in said contracts to Simmons. The month following, Simmons, for the purpose of raising money with which to make payments under his contract with Branch, had Langdon discount Simmons' promissory note for $5,000, promising to repay said indebtedness with one-fourth of all the gains, profits and emoluments which should accrue to Simmons under said construction contract. In December, 1887, Simmons, in consideration of $2,300 received from L. A. Conwell, agreed to pay one sixth of the profits and emoluments arising from said contract. Between these dates Simmons also borrowed from J. C. McNaughton $5,000 to make up the necessary amount which Simmons had agreed to pay under said several contracts. By virtue of these several transactions, Langdon, Conwell and McNaughton became equitably entitled, to the extent of their interests, to the securities and assets of the Short-Line Company. Simmons having failed to redeem his promises to Langdon, Conwell and McNaughton, these parties brought a bill against the Savannah, Dublin & Western Short-Line Railway Company, United States Construction & Improvement Company, James A. Simmons, Thomas P. Branch, Central Railroad & Banking Company of Georgia, and, by amendment, made E. P. Alexander and Savannah & Fort Valley Railway Company parties to said bill. In the original and amended bills the several contracts and transactions hereinbefore referred to were set forth, and it was further alleged that Branch and Simmons were in a secret conspiracy to cheat and defraud complainants; that they unlawfully obtained the management of the affairs of the Construction Company; that, for a nominal consideration, they caused a sale to be made to Thomas P. Branch of all of complainants' interests in the stock of said company; that Branch and Simmons entered into an agree-

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ment to sell and deliver the entire control of the Construction Company, with all securities, stock and bonds of the Short-Line Company, to the Central Railroad & Banking Company of Georgia, for the purpose of defeating the construction of the road, and thus cheat and defraud complainants; that the Construction Company was a mere sham and used for the purpose of obtaining control of the Short-Line Railway Company; that the Construction Company was insolvent; that E. P. Alexander was the president of the Central Railroad & Banking Company, and, in contracting for the purchase of the stock of the Construction Company, acted in the interest of the Central Railroad & Banking Company; that the Savannah & Fort Valley Railway Company was formed by friends of the Central Railroad & Banking Company; that E. P. Alexander was likewise its president; that it was a creature of the Central Railroad & Banking Company; that the purchase of the stock from the stockholders of the Short-Line Company was made by the general counsel of the Central Railroad & Banking Company, who was also acting for the Savannah & Fort Valley Railroad, the Short-Line Company, and the United States Construction & Improvement Company; that the money paid was the money of the Central Railroad & Banking Company; that the Savannah & Fort Valley Railroad Company, and the parties in whose name the stocks purchased as aforesaid stood, were not holders for value, but in truth held them for the Central Railroad & Banking Company of Georgia; and that the assumption by the Savannah & Fort Valley Railroad Company of the Construction Company stock bought by E. P. Alexander was itself a contract or agreement which had the effect to defeat or lessen competition and to encourage a monopoly. The bill, as amended, prayed for an injunction, a receiver, discovery, annulment of attempted stock, etc., transfer, declaration of trust, and accounting. On the part of some defendants the questions of want of equity and multi-

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fariousness as to subject-matter and parties were raised by demurrer. Other defendants answered. After granting a preliminary injunction, the case was heard upon the pleadings and affidavits. In granting complete relief it was held that:

(1) Unearned profits may be pledged as security for the advancement of funds with which to carry out an enterprise;

(2) Persons making advances for the carrying out of an enterprise with a view of being repaid by a portion of the profits arising from such enterprise have an equitable lien on such profits;

(3) Where a third person furnishes funds with which to carry out a specific enterprise, and is to receive as security a portion of the profits arising from such enterprise, the transaction constitutes the borrower a trustee in equity, who is bound to account to the lender for such profits;

(4) A corporation has no power, either directly or indirectly, to acquire a controlling share of the capital stock of another corporation when done for the purpose of preventing or defeating competition;

(5) Frauds and trusts are peculiarly the subjects of equity jurisdiction;

(6) Where a person is beyond the jurisdiction of a court of equity he is not such an indispensable party as will defeat the power of a court having jurisdiction over the subject-matter to proceed against those within the jurisdiction, although, if he were within the jurisdiction, he would be a proper party to the proceeding; and

(7) A bill is not multifarious where the complainant proceeds upon identical titles to correct an identical wrong by the same wrong-doers, and with reference to the same subject-matter.

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## LANGE v. WERK.

(2 Ohio St. 520, 1853.)

**Restraint of Trade, Covenants, Divisibility, Presumptions; Damages; Pleading.**

L covenanted with W that, for a certain time, he would not be connected either directly or indirectly with the manufacture of a certain commodity in the county of H, Ohio, or any other place in the United States, nor would he give his assistance, nor communicate his knowledge of a certain business to any person whatever under forfeiture of an amount named as liquidated damages. In an action to enforce this covenant the defendant demurred twice to the declaration, first as originally filed, and, second, as amended. Both demurrers were sustained. On appeal to a higher court the judgment sustaining the demurrer was overruled. The case was then remanded and tried and judgment rendered in plaintiff's favor. This judgment was affirmed by an intermediate court. In reversing the latter judgment it was held that:

(1) Where a restrictive covenant covers the entire United States and also a particualr place, the covenant is divisible and may be upheld as to the portion relating to the particular locality, and considered void as to the part covering the entire United States; (p. 530, *et seq.*)

(2) All contracts or covenants in restraint of trade are *prima facie* invalid; (p. 527, *et seq.*)

(3) Damages arising from breach of a restrictive covenant are considered liquidated where there is an express agreement to that effect, on the principle that, independently of the stipulation, the damages would be wholly uncertain and incapable of being ascertained except by conjecture; (p. 535)

(4) A complaint or declaration based upon a contract or

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covenant in restraint of trade which fails to show any sufficient consideration or good reason for entering into the agreement, is demurrable generally, because without such averments it will be presumed that the contract is unreasonable and oppressive, as tending to deprive the covenantor of his livelihood, and society of the labor and skill of a useful member, without any corresponding benefit or need of protection to the covenantee. (p. 529, *et seq.*)

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## LANYON et al. v. GARDEN CITY SAND CO. et al.

(223 Ill. 616, 79 N. E. 313, 1906.)

**Contracts, Restraint of Trade; Estoppel; Injunction.**

Prior to 1901, L owned a large undeveloped tract of land in Indiana, containing fire-clay. H and R, experienced miners, together with G, H and W, owned or were interested in a fire-clay grinding plant at Russell switch, Indiana. G, H and W for many years were engaged in selling fire-clay, brick and other clay products. In that year, these parties, in consideration of L's erecting a new plant at Jonesdale switch, Indiana, agreed that the Russell switch plant was to be closed down, and H and B were to operate L's plant, furnishing its product to G, H and W at certain prices. It was further agreed that L should not operate or control any other plant than the one thus to be operated by H and B, and H, B and L agreed not to sell to any other parties than G, H and W, the latter agreeing to purchase at stipulated prices certain quantities of the product of L's plant, and not to purchase such products in the state of Indiana from any other parties than H and B. This contract was to continue for eight years, and was recorded. L entered upon the erection of the new plant, but in a little less than a year conveyed his plant property to S, a corporation, without completing his new plant. S was immediately notified of the rights claimed under said contract, but, disregarding them, completed the new plant and proceeded to manufacture and sell fire-clay. A bill in equity was thereupon filed to restrain S and L. from operating said plant and making said sales, and for an accounting. On a reference to a master there was a finding that the contract in question was in the form of a trust in restraint of trade. This finding was.

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made the basis for a decree dismissing the bill. On appeal to the appellate court the lower court was reversed. In affirming the appellate court, it was held that:

(1) When the main purpose of a contract is to promote, or to increase, the business of those who enter into it, and the contract only incidentally restrains trade or competition such contract is not prohibited by either Federal or state anti-trust laws; (223 Ill. 621)

(2) "Contracts in partial restraint of trade, in order to be valid, must be reasonable as to time, place, terms, etc., manifesting an intention simply to protect the party relying upon the covenant in the reasonable restraint of unjust discrimination against him;" (p. 622)

(3) Where a party has full notice of another's right to property he is using, he will not be heard to complain of an injury that might result from the enforcement of such right; (p. 627)

(4) A court of equity will prevent a breach of a contract or the continuation of such breach, notwithstanding its inability to specifically enforce performance on both sides of the contract involved; (p. 626)

(5) Negative covenants may be enforced in equity regardless of whether or not an action at law will lie; (p. 626)

(6) Negative covenants are enforcible in equity regardless of the subject-matter of the contract; (p. 627)

(7) Where relief is sought against a party under a contract to which he is not a party or by which he is not bound equity has jurisdiction; (p. 628) and

(8) Where an action for damages would be unavailing on account of the financial irresponsibility of the party sued, there is no such remedy at law as will prevent equity from taking cognizance.

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## LEONARD v. POOLE.

(114 N. Y. 371, 21 N. E. 707, 11 Am. St. Rep. 667, 1889.)

### Restraint of Trade; Conspiracy; Actions.

A number of firms engaged in buying and selling produce on a commission formed a pool and combination to corner the market and enhance the price of lard. For this purpose they entered into an agreement for the purchase and sale of a stipulated quantity of lard, it being provided that the purchases and sales were to be made under the direction and control of a majority of the parties; that certain lard owned by some of them was to be withdrawn from the market; that each party should be responsible for a certain proportion of the total amount of lard purchased; and that there should be a *pro rata* division among the parties of the profits and losses arising from the transaction. An action for an accounting having been brought against one of the parties to this agreement, the action was dismissed. In affirming this judgment it was held that:

(1) An agreement or combination between two or more dealers to corner the market in a commodity and enhance its price is contrary to 2 R. S. 692, sec. 8, subd. 6, and Penal Code, sec. 168; (114 N. Y. 377)

(2) "When persons knowingly promote and participate in carrying out a criminal scheme they are all principals, and the fact that one of the parties acts, in some respects, in subordination to the others and is to profit less than the others, or not at all, by the consummation of the scheme, does not render such person less a principal;" (p. 378)

(3) An agent or broker who is privy to an unlawful design of parties whom he brings together for the very purpose of

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entering into an illegal agreement, being *particeps criminis*, cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction; (p. 379) and

(4) Courts will not aid those who violate the law to adjust differences arising out of their illegal transactions. (pp. 378, 380)

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## LESLIE v. LORILLARD.

(110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456, 1888.)

### Trade Restraint; Stockholders.

Two steamship companies entered into a contract whereby one company agreed to cease or in any way be interested in running steamships between certain ports; in consideration of which the other company agreed to pay a fixed sum of money in regular instalments. A stockholder of the steamship company which ceased to operate its boats thereupon sought to enjoin, among other things, the making of payments under said contract and its cancellation. The lower court overruled a demurrer to the complaint, rendering an interlocutory judgment. This judgment was reversed and the complaint ordered dismissed, the court of appeals holding that:

(1) A contract is not in general restraint of trade when it operates simply to prevent a party from engaging or competing in the same business; and

(2) Where the managing board of a corporation, in the exercise of discretionary powers, makes corporate contracts which are not *ultra vires*, such contracts cannot be assailed by stockholders.

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## LEVIN v. CHICAGO GAS LIGHT & COKE CO.

(64 Ill. App. 393, 1896.)

**Particeps Criminis; Ultra Vires; Laches; Pleading.**

After waiting about five years a stockholder, who claimed to own stock in six corporations, filed a bill alleging: (a) numerous fraudulent *ultra vires* acts committed by the officers of these corporations; (b) an unlawful combination between said corporations and three other corporations, under 1891 Illinois anti-trust law. The bill prayed relief from the consequences of said acts and sought the prevention of the commission of similar threatened acts. There were no allegations as to when the complainant became a stockholder. Nor was anything alleged negativing his participation in the illegal acts charged. The only statement tending to show lack of knowledge of such acts was the general allegation that he became a stockholder without any knowledge that the transaction was tainted by a conspiracy or combination. General demurrers were sustained to this bill, and the bill was dismissed for want of equity. In affirming the lower court, it was held that:

(1) Equity will not relieve any one who has been engaged in illegal conduct;

(2) A stockholder in a private corporation seeking protection against the consequences of an *ultra vires* act must apply for relief with sufficient promptness to enable the court to do justice to him without doing injustice to others;

(3) A mere allegation that a certain commodity or property was acquired without knowledge that the same was tainted with any conspiracy or unlawful combination, omitting to state when such article was acquired, is not enough;

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(4) In the absence of allegations showing when a certain transaction took place it will be presumed that such transaction was consummated at the same time the particular acts complained of were committed; and

(5) In equity, as at law, pleadings are construed most strongly against the pleader.

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## LEWIS v. WEATHERFORD, MINERAL WELLS & NORTHWESTERN RAILWAY CO.

(81 S. W. 111, Tex. Civ. App. 1904.)

**Railroads; Regulations; Discrimination; Exclusive Privileges.**

Green and Lewis were in the livery and transfer business at Mineral Wells, Mo. The Weatherford, Mineral Wells & Northwestern Railway Co., which ran trains to that place, gave Green the exclusive right to pass through its trains and solicit business from its passengers. By a regulation of said railroad company only one person was permitted to exercise said privilege. Lewis persisted in soliciting business for himself notwithstanding said regulation. The railroad company thereupon brought an action against Lewis and others in his employ to restrain them from exercising this privilege. An injunction was granted, and, on appeal, affirmed, the court holding that:

(1) In matters unconnected with the contract of carriage, a carrier may make a rule or regulation whereby one individual might have the exclusive right to go upon its trains for private business purposes to the exclusion of others in similar private occupations; and

(2) The anti-trust law of 1889 (art. 5313, Rev. St. 1895) does not prohibit a railroad company from granting the exclusive privilege to solicit transfer business on its *own* trains.



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## LIVERPOOL & LONDON & GLOBE INSURANCE CO. v. CLUNIE.

(88 Fed. 160, U. S. C. C., Cal. 1898.)

**Public Officials, Duties, Discretion; Foreign Corporations; Unconstitutional Statute; Construction; Equity Maxims; Collateral Proceeding; Jurisdiction; Pleading.**

The only conditions upon which the Insurance Commissioner of California was authorized to revoke certificates issued to insurance corporations permitting them to do business were whenever an insurance company or insurer became insolvent (sec. 600, Pol. Code Cal.) or whenever a foreign insurance company transferred, or caused to be transferred, an action to the United States circuit court (sec. 595, Pol. Code Cal.). The insurance commissioner, however, attempted to oust from the state sixty-two foreign insurance companies by refusing to approve new bonds. His reasons for taking this action were because: (a) each one of the corporations was a member af an association known as the "Board of Fire Underwriters of the Pacific," the purpose and effect of which was to create a monopoly of the fire insurance business within the state; (b) the capital stock of some of the insurance companies was not paid up; (c) the stockholders of the foreign insurance companies did not consent to individual and personal liability for corporate debts; (d) no place was provided in the state for the transfer of stock and the keeping of books; and (e) such companies as did not procure renewal certificates annually were unlawfully transacting business in the state. Also, under a void revenue law, he insisted upon the payment of a tax. The insurance companies, under five groups, presented

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bills in equity to restrain said commissioner from taking action against them, alleging: the character of complainants' business; full compliance with state laws previous to commencing business; solvency; the passage of a certain revenue act subsequently held to be unconstitutional; the insurance commissioner's demands and threats to enforce said act by requiring the complainants to pay a certain tax notwithstanding the unconstitutionality of the act; non-payment of said tax by the complainants; establishment of numerous agencies and the doing of a large business; and claiming that irreparable injury would result unless the commissioner shall be restrained from carrying out his threats to revoke their licenses. By a supplemental bill it was shown on behalf of the insurance companies that renewal bonds in proper form and with substantial security were offered to the insurance commissioner, but that he refused arbitrarily to approve them. The insurance commissioner contended that the revenue statute referred to was a valid and subsisting condition precedent to the transaction of business by foreign insurance companies; that the several bonds were rejected after a full and complete investigation of the facts concerning their insufficiency and invalidity; and that the complainants had no right to prosecute their actions because they constituted an illegal combination created for the purpose of preventing competition in the insurance business, seven-eighths of the insurance companies being members of said combination. In granting a temporary injunction, it was held that:

(1) A public official can perform only such duties as the law confers upon him;

(2) Only when a public official, in the performance of his duties, exercises legal discretion in good faith, and within the limitations of his authority, courts will not review his judgment or restrain his action;

(3) An unconstitutional statute is absolutely void and

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cannot be regarded as a condition precedent to the transaction of business by foreign corporations;

(4) A construction placed by the highest court of a state upon its own constitution and statutes is binding upon Federal courts;

(5) The question whether a party to a litigation constitutes, or is a member of, an unlawful combination in restraint of trade cannot be determined in a collateral proceeding;

(6) The maxim that he who comes into a court of equity must do so with clean hands is inapplicable to general iniquitous conduct unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but applies only to evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought;

(7) "A court of equity will, in a single suit, take cognizance of a controversy, determine the rights of all the parties, and grant the relief requisite to meet the ends of justice in order to prevent a multiplicity of suits, where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter may be settled in one action brought by all these persons uniting as co-complainants;" and

(8) An objection directed to matters appearing on the face of a bill must be raised by demurrer.

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## LOCKER et al. v. AMERICAN TOBACCO CO. et al.

(106 N. Y. Supp. 115, 1907.)

**Exclusive Agency Contracts; Pleading; Practice.**

This was an action for damages and injunction to restrain an alleged combination in restraint of trade, the complaint alleging in substance that the defendant, the American Tobacco Company, was associated with, and controlled a large number of corporations which, like itself, were engaged in the manufacture and sale of the product of leaf tobacco; that these associated corporations controlled and marketed more than ninety per cent of such products in this country and in the city of New York; that no dealer or jobber in the tobacco business could successfully do business without obtaining and handling the products of these associated corporations; that the defendant, the Metropolitan Tobacco Company, was not a manufacturer of tobacco, but was appointed by the said associated corporations their sole agent to sell their products in the City of New York, and was acting as such, and that such products could be purchased of it alone by dealers in tobacco products in said city, the said corporations refusing to sell to them except through their said agent; and that the said agent "with the knowledge and consent of the other defendants," refused to sell any of the said products to the plaintiffs, who were jobbers and dealers in tobacco products in the said city. A motion to dismiss the complaint on the ground that it did not state a cause of action was sustained. In affirming this judgment, it was held that:

(1) A complaint which fails to allege that the incorporation of the defendant is unlawful or for an illegal purpose; that the defendant's acquisition of, or unity with, other

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corporations is unlawful or in pursaunce of any agreement to advance or control prices, discriminate between dealers, or in any manner restrain or wrongfully control trade, or that it was for such purpose or pursuant to such an agreement that a sole agent was appointed; that at any time either of the defendants entered into an unlawful or forbidden combination or merger, or became a party to an illegal arrangement or agreement; but alleges that the sole parties to the arrangement are manufacturing corporations and producers and a sales or distributing agent without alleging that sales prices were fixed or controlled by these manufacturers or producers, does not state a cause of action sufficient to entitle a party in no way connected by contracts with either of the defendants to bring an action against them;

(2) It is not unlawful for a purely manufacturing or producing corporation to confer upon a non-producing or non-manufacturing wholesaler or retailer the sole right and exclusive privilege of marketing the entire product of such manufacturing or producing corporation, when the agreement in no way attempts to establish sales prices or interferes with production;

(3) Federal anti-trust laws relate only to matters in restraint of trade or commerce between or among the several states of the Union or with foreign nations, and for a violation of their provisions redress must be sought in the Federal courts, which alone have jurisdiction; and

(4) On motion to dismiss a complaint for want of facts stating a cause of action every allegation of fact contained in the pleading must be taken as admitted, in addition to which plaintiffs are entitled to the benefit of every fair and reasonable presumption which may be justifiably implied therefrom.

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## LODER v. JAYNE et al.

(142 Fed. 1010, U. S. C. C., Pa. 1906.)

## JAYNE et al. v. LODER.

(149 Fed. 21, U. S. C. C. A., Pa. 1906.)

**Conspiracy, Co-conspirators; Evidence; Practice, Remittitur.**

Under section 7 of the Sherman anti-trust law a retail and wholesale druggist brought suit against the Philadelphia Association of Retail Druggists, an incorporated company, its officers and members, for damages to his retail drug business, caused by said company being in combination with three voluntary associations—the Proprietary Association of America, the National Wholesale Druggists' Association and the National Association of Retail Druggists—to arbitrarily fix a minimum retail price for drugs and restrict their sale to such retailers only as maintained prices. The coercion used in forcing a dealer to live up to prices was this: Upon his refusal to maintain the regular prices fixed by a local association his name was reported to the National Association of Retail Druggists as an "aggressive cutter." The National Association of Retail Druggists then notified the Wholesalers' and Manufacturers' Associations and requested their members not to deal with such dealer. By reason of these associations controlling from ninety to ninety-five per cent of the entire drug business, their refusal to sell to such dealer crippled him in his business. On proving this plan to have been carried out by said associations against the plaintiff resulting to his damage, a verdict for a large amount was awarded him. In modifying said verdict, the court held that:

(1) A combination of local and national associations of retailers and wholesalers in drugs controlling between ninety to ninety-five per cent of the entire drug business, arbitrarily fixing a minimum retail price for drugs throughout the country and restricting their sale to such dealers

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who conduct their retail business in accordance with this arbitrary standard of prices, is within the Sherman anti-trust law;

(2) In the admission of evidence in conspiracy cases, the rule is to require first the proof of a *prima facie* case of conspiracy before the acts and declarations of co-conspirators made in the absence of defendants are admitted against them although the court may, in its discretion, permit evidence of declarations to be introduced out of its order, upon condition that it be afterwards followed by evidence of the conspiracy;

(3) In an action for damages under section 7 of the Sherman anti-trust act, the burden of proof is upon the plaintiff to show by a preponderance of competent evidence some real and actual damage to his business by reason of the unlawful combination;

(4) In support of a claim for damages, a party is required to prove only such facts as will enable the jury to arrive at an amount of damages with reasonable certainty; and

(5) Where a verdict for more than a party is entitled to is rendered, it is the court's duty to require him to remit the excess, if the exact amount can be readily determined, or grant a new trial.

NOTE.

On appeal, the judgment was reversed as to these points only:

(a) Where a joint tort is charged, it must be proved not only as laid, but all the defendants must be shown to be liable for all that was done; (149 Fed. 31)

(b) Joining in a conspiracy at an advanced stage makes one a party to what already has been done in pursuance of it only when he has knowledge of acts done in promotion of the common cause; (p. 30) and

(c) Where a claim for damages is submitted to a jury on incompetent evidence as to certain items and a verdict is returned for less than the total amount claimed, such an error cannot be rectified by requiring a remittitur of the amount of the items so erroneously submitted, since a court cannot know whether, or to what extent, such items entered into the verdict. (pp. 22, 23)

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## LOEWE et al. v. LAWLOR et al.

(130 Fed. 633, U. S. C. C., Conn. 1904.)

### Damages; Jurisdiction.

In the foregoing case it was held, on demurrer to a plea in abatement, setting up *lis pendens* in a state court, and on motion to vacate an attachment, that:

(1) Federal courts have exclusive jurisdiction over actions for treble damages under section 7 of the Sherman anti-trust act; and

(2) In the absence of Federal statute, Federal courts are governed by state remedies.

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## LOEWE et al. v. LAWLOR et al.

(142 Fed. 216, U. S. C. C., Conn. 1905.)

**This case merely holds that the sufficiency of a complaint under secion 7 of the Sherman anti-trust act cannot be reached by a mere motion for its correction.**

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## LOEWE et al. v. LAWLOR et al.

(28 Sup. Ct. Rep. 301, 208 U. S. 274, 52 L. ed. —, Conn. 1908.)

### Interstate Commerce; Boycotts; Damages.

This was a proceeding under section 7 of the Sherman anti-trust law claiming threefold damages for injuries sustained from a combination and conspiracy, the complaint substantially alleging that the plaintiffs were manufacturers of hats in the city of Danbury, Connecticut; that they owned and operated a factory employing about two hundred and thirty men and were engaged in interstate trade in about twenty states, amounting to about four hundred thousand dollars per annum; that they were practically dependent upon such interstate trade for a market; that at the time the alleged conspiracy was formed they were in the process of manufacturing a large number of hats for the purpose of fulfilling engagements then actually made with consignees and wholesalers in states other than Connecticut; that if they were prevented from said manufacturing they would be unable to complete their said engagements; that the defendants were members of a vast combination called the United Hatters of America, comprising about nine thousand members and embracing subordinate unions; that said organization was a part of another organization denominated the American Federation of Labor, which at the time comprised about one million four hundred thousand members in various parts of this country, including twelve thousand local unions, twenty-eight federations, five hundred central labor unions and more than two thousand local unions; that said organization operated through an executive committee, which, in the interval between annual meetings, had the control of the vast collective force of this body of men; that for the purpose of enforcing its boycotts upon domestic or interstate trade it employed one thousand organizers who

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went all over the country, and, whenever it was deemed essential, said organization actively pushed the boycott upon the interstate trade of recalcitrant manufacturers; that this American Federation of Labor, of which the defendants were members, was engaged in a combined scheme to force all manufacturers, including plaintiffs, to unionize their shops with the intent thereby to control the employment of labor and to subject the same to the direction and control of persons other than the owners of the same; that in pursuance of this scheme, out of eighty-two manufacturers of this country engaged in the production of hats, seventy had submitted to said organization; that the plaintiffs were required to unionize their shop under peril of being boycotted by this combination, but that they refused to do so; that as a result the defendants, on or about July 25, 1902, instituted a certain boycott of the plaintiffs' factory by threatening and coercing all makers and furnishers of hats to withdraw their custom from the plaintiffs, by declaring a boycott against all hats made, sold and delivered by plaintiffs to wholesalers in states other than Connecticut, by actively boycotting the business of those who should deal in them, by inducing others to declare such a boycott, by intimidating wholesalers to prevent them from purchasing or dealing in hats of plaintiffs, and by employing a large number of agents to visit such wholesalers to threaten and prevent them from buying such hats; and that these various acts of the defendants resulted in the plaintiff's injury and damage to the amount of eighty thousand dollars and demanded judgment for three times that amount. A demurrer to this complaint having been interposed, the circuit court sustained the same on the ground that the complaint did not present a case within the Sherman antitrust law and dismissed it. On writ of error from the circuit court of appeals, that court certified to supreme court a certain question. Afterwards, on application of both litigants, the supreme court reviewed the entire record. In reversing the circuit court, it was held that:

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(1) As against a demurrer, a good cause of action is stated under section 7 of the Sherman anti-trust act when the complaint or declaration states that the defendants formed a combination to directly restrain plaintiff's trade; that the trade to be restrained was interstate; that certain means to attain such restraint were contrived to be used and employed to that end; that those means were so used and employed by defendants; and that thereby they injured plaintiffs' property and business; (28 Sup. Ct. Rep., 311½)

(2) Interstate commerce is restrained within the meaning of the Sherman anti-trust act whenever the purposes of a contract, combination, or conspiracy are to prevent any interstate transportation, the fact that the means used operate at one end before physical transportation commences, and at the other end after physical transportation ends, being immaterial; (p. 309)

(3) All acts claimed to constitute an obstruction to interstate commerce must be considered as a whole, and a plan is within the prohibition of the Sherman anti-trust act whenever its main purpose is to affect interstate commerce; (p. 309½)

(4) Any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in interstate business, is within the Sherman anti-trust law; (p. 303)

(5) The Sherman anti-trust law declares illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and irrespective of the parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states; (p. 304½) and

(6) Any agreement or combination which directly operates upon the manufacture, sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale or disposition, thereby regulates interstate commerce. (p. 308.)

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## LOGAN v. CENTRAL RAILROAD COMPANY.

(74 Ga. 684, 1885.)

**Railroads, Discrimination; Damages.**

East Tennessee, Virginia & Georgia Railroad Company, a competitor of the Central Railroad Company, offered to it at a certain connecting point a large shipment of salt owned by Logan & Company for transportation in unbroken cars to a point on the line of the Central Railroad Company. The Central Railroad Company refused to transport these cars, although of the same gauge as its own, and not defective in any way, unless the salt was unloaded and carried by drays from the East Tennessee, Virginia & Georgia Railroad Company yards and loaded on the Central Railroad Company cars. This was done merely to discriminate against the Tennessee, Virginia & Georgia Railroad Company. Logan & Company thereupon brought an action for damages against the Central Railroad Company. The lower court sustained a demurrer to the declaration. In reversing this judgment it was held that:

(1) Section 719 (q), et seq., Code (Acts 1874, p. 93), prohibits any regulation by a railroad which has the effect to discriminate unfavorably between facilities offered to its shippers and those offered by it to shippers of other connecting railroads within the state;

(2) A connecting line against which discrimination is prohibited by Act of 1874 is any railroad which, at its terminus, or any intermediate point along its line, joins another, or where two railroads have the same terminus, or where a railroad is adjacent to another and capable of being joined to it by a switch, either at its terminus or anywhere along its line;

(3) The Act of 1874 authorizes the consignor or consignee to sue for damages in case of its violation; and

(4) A lessee of a railroad is responsible for all damages caused by the operation of the leased railroad.

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## LORILLARD v. CLYDE et al.

(86 N. Y. 384, 1881.)

**Corporations, Organization; Contracts; Pleading; Practice.**

Two competitors, an individual and a firm, engaged in navigation, in 1874 agreed to consolidate their businesses by forming a corporation to take over the same. They thereupon agreed to capitalize the new company at a certain sum, represented by business property to be contributed by each of them; that each should receive a certain proportion of the capital stock; that the firm should have the management of the consolidated business; and that the individual should have a yearly guaranteed dividend. Pursuant to this agreement a corporation was organized, the agreed transfers of property were made to it, and its management was undertaken and continued by the firm for some time. An action having been brought upon said agreement against the members of said firm for the guaranteed dividend, the defendants demurred to the complaint on various grounds. The trial court sustained the demurrer. In reversing the lower court it was held that:

(1) While an agreement between incorporators of a new company providing for the details of its management made in advance of incorporation is not binding upon the trustees or directors after the organization of the company, it is not against public policy to agree upon a general plan for the management of a prospective corporation when it is not inconsistent with the incorporation laws of the particular state under which incorporation is sought, and is done for the best interests of the new company; (p. 389)

(2) It is not against public policy for parties about to form a corporation to agree that the capital stock is to be represented by property which they severally contribute at an agreed valuation between themselves, when the valuation is

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made in good faith and is not fictitious or extravagant; (p. 388)

(3) A contract will be held valid whenever it is capable of a construction which will uphold it, as the law does not assume an intention to violate it; (p. 387)

(4) "The presumption is in favor of the legality of contracts;" (p. 387)

(5) When a contract requires the incorporation of a company, to plead its performance in that respect it is not necessary for the plaintiff in an action upon such contract to state in his declaration or complaint the precise steps taken to incorporate, an allegation that a corporation was duly organized under the laws of a particular state pursuant to the agreement being all that is necessary; (p. 388)

(6) "On demurrer, all reasonable intendments are indulged, in support of the pleading demurred to;" (p. 389) and

(7) Where a declaration or complaint is indefinite and uncertain such defect can be reached only by motion. (p. 389)

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## LOUISVILLE & NASHVILLE R. R. CO. v. KENTUCKY.

(161 U. S. 677, 40 L. ed. 849, Ky. 1896.)

**Corporations, Charters, Construction; Contracts; Constitutional Law, Police Power, Scope; Railroad Consolidation, Corporate Stock Ownership.**

The Louisville & Nashville Railroad Co. was incorporated in 1850, under special Kentucky legislative enactment, to construct and operate a railroad within the state of Kentucky. By subsequent amendments this company was empowered to unite its road with any other connecting railroad and extend any branch road by construction, purchase, or agreement. From a short line of railroad the Louisville & Nashville Railroad became an important railway system, owning and operating several branches. The Chesapeake, Ohio and Southwestern Railroad Co. was incorporated in 1881 under a Kentucky special act for the operation of a railway system in many important points parallel to and competing with the Louisville & Nashville Railroad Co. In a petition by the state for an injunction against the Louisville & Nashville Railroad Co. the Chesapeake, Ohio and Southwestern Railroad Co. and a number of other railroads, it was charged that the Louisville & Nashville Railroad Co., entered into an agreement whereby it was to acquire the capital stock, and an interest in real property and mortgage securities of the other defendant companies, in order to obtain control and ultimately purchase at judicial sale and become the owner of their franchises and property, in violation of a constitutional provision forbidding railroad consolidation, purchase or leasing by parallel or competing railroads. Although the Louisville & Nashville Railroad Co. answered generally denying the allegations



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contained in the petition, the purchase of the stock and securities referred to was admitted by claiming the transaction to have been consummated, and that said company intended to purchase the franchises and properties at judicial sale. Upon a hearing there was a decree enjoining the proposed consolidation. This decree was affirmed by the court of appeals of Kentucky. In affirming the latter court it was held that:

(1) The power of one railway corporation to purchase the stock and franchises of another must be conferred by express language to that effect in the charter; (161 U. S. 702)

(2) In the absence of an express stipulation in the charter, the purchaser of stock by one railroad corporation in another competing railway company is contrary to public policy and void; (p. 698)

(3) "A power to connect or unite with another road refers merely to a physical connection of the tracks and does not authorize the purchase or even the lease of such road, or any union of their franchises;" (p. 684)

(4) On the maxim *noscitur a sociis* (it is known from its associates) general terms in a corporate charter are to be limited by special provisions in the same; (p. 687)

(5) Where parallel and competing railway companies claim authority to consolidate they must be able to point to words in the statute which admit of no other reasonable construction; (p. 688)

(6) In determining the intentions of parties to an instrument ambiguous upon its face by contemporaneous construction, such construction must be shown to have been as broad as the exigencies of the case require; (p. 690)

(7) All doubtful authority in a corporate charter is to be resolved against the corporation, for a surrender of the power of the legislature in any matter of public concern is never presumed from uncertain or equivocal expressions; (p. 685)

(8) The mere exercise of a power for a long period in violation of a constitutional prohibition will not estop a state from enjoining its further exercise; (p. 690)

(9) A contract beyond the corporate power of either party

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is as invalid as if beyond the corporate powers of both, because to make a valid agreement there must be a meeting of minds, and if there is a disability on the part of either party to enter into the proposed contract there can be no valid agreement; (p. 692)

(10) Under a statute declaring that a corporation should be governed by any general law enacted by the legislature, a corporation, although organized prior to the adoption of a constitutional provision forbidding the consolidation of parallel and competing railroad corporations, becomes subject to such constitutional provision immediately upon its adoption; (p. 692)

(11) Under the police power, the people, in their sovereign capacity, or the legislature, as their representative, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health and safety of its passengers or the public, or for the security of property or the conservation of the public interests, and forbid the consolidation of parallel or competing lines, whenever, in its opinion, such consolidation is calculated to affect injuriously the public interests, provided, no vested rights are thereby impaired; (pp. 695, 698)

(12) "Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state and within the legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry;" (p. 701)

(13) When the purchase of a railway by a competing or parallel railway company is forbidden on the ground of public policy, such prohibition extends to judicial, as well as private, sales; (p. 693) and

(14) In making investments, capitalists are bound to know the authority of the company under its charter, and to put the proper interpretation upon it, as investments will not be presumed to have been made upon the faith of powers that do not exist, and, if investments are made under a misapprehension of law, the state is not bound to respect them. (p. 691)

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## LOVEJOY et al. v. MICHELS.

(88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770, 1891.)

### Sales, Price; Trust Defense.

This was an action of assumpsit for the price of two sets of knives. At the time the defendant gave the order for the knives no price was mentioned. Three or four months prior to the giving of the order, the plaintiffs offered to sell to the defendant knives at a price then stated. After the goods were ordered, delivered and used, there was a considerably larger price placed upon them than when the defendant's trade was solicited. The defendant pleaded the general issue with notice of recoupment. Under these issues the defendant proved that the plaintiffs were members of the "Machine Knife-Makers' Association;" that this association, at the time the order was given, etc., embraced all except one of the knife-makers in the United States; that one of the principal objects of the association was to keep up prices; that its members agreed to sell at prices thus fixed, and in case of failure to maintain such prices, a member was subject to a $100 forfeit; that a certain advance in prices was made at the time of said purchase; and that the price charged by plaintiffs was fixed by the association. At the trial the court ruled out certain evidence and gave certain instructions which were claimed to be prejudicial to the defendant, the trial resulting in a verdict and judgment in plaintiffs' favor for more than the amount claimed by the defendant to be due the plaintiffs. In reversing this judgment it was held that:

(1) A combination between all of the manufacturers of a certain commodity to fix and maintain prices is unlawful

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as against public policy, although the prices thus fixed are reasonable; (88 Mich. 23)

(2) When a sale upon credit is made without agreement upon the price, the law implies an understanding to pay what the commodity is reasonably worth; (p. 26)

(3) In the absence of an agreement as to the price of a commodity, a purchaser is not bound by the price fixed through an unlawful combination of dealers in such commodity; (pp. 23, 25)

(4) "The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition;" (pp. 23, 24)

(5) Where there is a combination between all of the manufacturers in a commodity to fix and maintain prices, there is no "market price" beyond the one thus established; (p. 23)

(6) Where the "market price" of an article is regulated and maintained through an unlawful combination, evidence of a fair market price or a fair market value is admissible; (p. 25) and

(7) "All inferences to be drawn from the testimony are exclusively for the jury, and not for the court." (p. 25)

NOTE

The foregoing conclusions, except proposition 2, are taken from the opinion of McGrath, J., concurred in by Morse, J. Champlin, C. J., wrote a separate opinion, arriving at similar conclusions by a different mode of reasoning. Grant, J., also rendered an opinion, in which Long, J., concurred, arriving at the same final decision as the others.

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## MACAULEY et al. v. TIERNEY et al.

(19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770, 1895.)

### Conspiracy; Competition; Artisans' Organization; Injunction.

By resolution of voluntary associations of master plumbers, national and local, members were required to withdraw their patronage from manufacturers of and wholesale dealers in plumbers' supplies who were selling to others than master plumbers and members. A master plumber being unable to purchase plumbers' supplies because of his non-membership in these associations brought an action to enjoin the members of the associations enforcing said resolution and performing other acts that were detrimental to his business. In dismissing the petition it was held that:

(1) It is not unlawful for artisans, singly or in combination, to patronize manufacturers or wholesale dealers only on condition that they deal with members of their association and to withdraw such patronage upon a violation of this condition; (33 Atl. 3)

(2) Any means adopted for the purpose of competition which does not involve fraud, misrepresentation, intimidation, coercion, obstruction or molestation of a rival or his employees, is lawful; (p. 2½)

(3) A threat made in the exercise of a legal right does not constitute coercion; (pp. 3, 3½)

(4) There is no conspiracy where neither the object of a combination nor the means adopted or used in accomplishing it is unlawful; (p. 4½) and

(5) Only that injury is actionable which results from a violation of a *legal right*. (p. 2)

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## MacGINNISS v. BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING CO.

(29 Mont. 428, 75 Pac. 89, 1904.)

**Corporate Stock Ownership; Montana Corporations; Minority Stockholder's Rights; Collateral Proceedings; Foreign Corporations; Parties; Practice; Proof; Appeal and Error.**

In order to concentrate their power and effect an organization for the purpose of protecting the properties of the Boston & Montana Consolidated Copper & Silver Mining Company from ruinous and groundless litigation, in January, 1899, a number of its stockholders made an agreement under which their shares of stock were deposited with a Massachusetts Trust Company for safe-keeping, and a protective committee of three shareholders was appointed. By this agreement the members of the committee were constituted sole agents and attorneys for the depositing stockholders, and were empowered to bring, prosecute and defend suits, or compromise or continue them; to take any step in connection with such suits deemed advisable by counsel; to vote all shares of the stock held in trust at all stockholders' meetings, either as a committee or through any one of its members; and to consent to a dissolution of the corporation and disposition of its property. This trust could be terminated at any time at the discretion of the committee. In April 1899 the Amalgamated Copper Company was organized under the laws of New Jersey, with a capital stock of $75,000,000, for the purpose of carrying on a general mining business with authority to purchase, subscribe for, or otherwise acquire the capital stock of, any other domestic or foreign corporation. April, 1901, certain Boston bankers com-

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menced negotiations with the Montana Company to effect an exchange of at least 100,000 shares held by the stockholders of that company for shares of the Amalgamated Company. Pending negotiation it was proposed that the shares of the Montana Company were to be deposited in their bank and negotiable receipts issued therefor. Upon consummation of the exchange each depositor was to receive a negotiable receipt for the number of shares of the Amalgamated Company he would be entitled to. If not satisfied with the result of the negotiations, each depositor was to have the option either to take $375.00 per share in money for his certificates or to withdraw them. It was further proposed by these bankers that they would reserve the right to return all stock deposited, unless within a date named they were prepared to submit a satisfactory offer for the exchange. Deposits were to be made on or before a certain date. This proposition was at once communicated by the directors of the Montana Company to the individual stockholders of that company, with a statement that all the officers, directors and large stockholders had agreed to make the deposit under the prescribed conditions. Like negotiations were begun at the same time with the directors and stockholders of the Butte & Boston Company, it being the wish of the Amalgamated Company not to acquire an interest in either company, unless it could obtain a majority of the stock in each of them. Finally, an agreement was reached for a satisfactory basis of exchange. June 6, 1901, the Amalgamated Company, at a meeting of its board of directors, increased its capital stock to $155,000,000 in order to effect the exchange. The Amalgamated Company then acquired 147,915 shares of a total of 150,000 shares in the Montana Company and 197,222 shares of a total of 200,000 shares in the Butte & Boston Company, thus giving the former complete control of the latter. Prior to June, 1901, the Amalgamated Company acquired all the stock in the Washoe

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Company, the Blackfoot Milling Company, and a majority of the shares in the Anaconda Copper Company, the Parrot Silver & Copper Mining Company and the Hennessy Mercantile Company, all Montana corporations. The corporations of which the Amalgamated Company had thus secured control, except the milling and mercantile companies, were engaged in the business of mining copper and other ores, and marketing the product. In July, 1901, a minority stockholder in the Montana Company filed a complaint against the Montana Company and others. The material part of this complaint was, substantially, as follows: That the purpose of the organization of the Amalgamated Company was to secure a monopoly of the production and sale of copper; that it had become the owner of a majority of the shares of the Montana Company and other corporations in Montana and elsewhere, some of which were mining corporations owning properties in the city of Butte, adjacent to the properties of the Montana Company; that the stock in all of these Montana corporations was acquired by the Amalgamated Company under an agreement with the officers and a majority of the stockholders of the Montana Company and the other corporations, for the purpose, entertained by the Amalgamated Company, of controlling all of the affairs and conducting all of the business of said corporations, through its officers and agents or boards of directors elected by it; that, as a part of this agreement, the officers and directors of the Montana Company stipulated to turn over the control and management of the business and property of the Montana Company to the Amalgamated Company, and to obey in all things, and submit to the directions and officers of the Amalgamated Company; that the officers and directors of the other corporations having adjacent properties in Butte were parties to this agreement; that, in pursuance of the same, the officers of the Amalgamated Company had assumed the possession of the properties of said com-

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panies, and the control and direction of their officers and businesses; that, if this condition of affairs was permitted to continue, the Montana Company would suffer loss, in that the mining properties of the various companies being adjacent to each other, controversies would arise among them over their respective rights beneath the surface, and that, by reason of the controlling position of the Amalgamated Company, these controversies would be settled by it to the detriment of the Montana Company, and of the rights of the plaintiff; that the Amalgamated Company, though engaged in conducting the business of mining and smelting copper through these companies in the state of Montana, had not complied with the foreign corporation laws of the state, and thus was engaged in conducting a business in Montana in violation of law; that the plaintiff and the other minority stockholders did not and have not assented to the arrangement by which the Amalgamated Company acquired its control of the Montana Company and its properties; that the Amalgamated Company had no right to own or control any property in Montana; that its action in the premises was in violation of section 20 of article 15 of the state constitution, and section 321 of the Penal Code; that the other defendants, except one, were the directors and officers of the Montana Company, and because of their participation in and furtherance of the purposes of the Amalgamated Company, aided by other agents of that company in Montana, were not fit and proper persons to have charge and control of the property of the Montana Company; that the purpose of the organization of that company was also to evade the laws of Montana, and to override and disregard the rights of the minority stockholders; and that because of the participation by the officers and a majority of the stockholders of the Montana Company in the combination aforesaid, and in the violation of the law in pursuance thereof, the property and franchises of said company were subject to forfeiture to the state

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of Montana, and thereby the minority stockholders would be deprived of the value of their stock. The relief asked was to annul the stock transaction between the Amalgamated Company and the Montana Company; to enjoin the voting of such stock or taking any part in the Montana Company's management of its affairs; to order an accounting; to declare the Amalgamated Company a trust and monopoly; to enjoin it from doing business in Montana either directly or indirectly; and to appoint a receiver to take charge of the Montana Company's properties during the pendency of this action. One of the defendants demurred generally to the complaint. Another defendant moved to strike out certain portions of it. From the evidence it did not appear that the combined companies entered into any agreement to control, in any way, the transportation, price of copper, or any by-product of the business, or to regulate the amount of production; nor that the Amalgamated Company had, in any way, attempted to use its power to discriminate in favor of or against any servient company to the advantage of itself or the detriment of any minority stockholder, or to affect competition. Although the dominant company could, either by means of its superior position or other connections, perpetrate any of these wrongs, it did not do so, nor did it manifest any disposition to do so. Its whole object and design was merely to act as a holding corporation in order to secure harmony among the servient companies. It did appear that the exchange of stock was made as an investment only; that each company had been allowed to pursue independently the purpose for which it was organized and to market its own product. An injunction having been granted, as prayed, the order was appealed from. In reversing the lower court, it was held that:

(1) One Montana corporation may hold and vote stock in another like domestic or foreign corporation; (75 Pac. 97½)

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(2) In the United States, except Iowa and Maryland, the general rule is that one corporation cannot hold or vote stock in another unless expressly authorized so to do by the terms of its charter or by statute; (p. 97)

(3) A foreign corporation having authority under its charter to own stock in another corporation may acquire and vote stock in a domestic mining corporation;

(4) A stockholder's rights are not affected "so long as the purposes of the corporate body are carried out under its charter for the benefit and profit of all the stockholders alike, according to the best judgment of those who have the active management of its business;" (p. 98)

(5) Where officers of a private corporation engage in acts which subject its property and franchises to forfeiture, a minority stockholder who has not participated in such acts may, through equity, compel such officers and the corporation to abandon their unlawful course and return to the lawful performance of the corporation's charter powers; (p. 92½)

(6) Whether a corporation or combination constitutes an unlawful monopoly is determinable at the instance of the state through its proper officers in a direct proceeding instituted in its behalf, and not at the instance of a private citizen; (p. 92)

(7) A state alone, through its proper officers in a proceeding in its behalf, and not a private citizen can question whether a foreign corporation has complied with state laws preliminary to commencement of business in the state; (p. 92)

(8) Under section 570, Code Civ. Proc. Mont., the real party in interest alone can prosecute an action; (p. 98)

(9) "One possessing a right may enforce it notwithstanding his motive may be evil;" (p. 98½)

(10) The nature of an arrangement or combination is a question of fact to be determined by the court from the evidence before it, or from the vice which inheres in the contract itself; (p. 95½)

(11) Where a combination does not in itself tend to

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create a monopoly, before such combination can be declared illegal, it must be shown that it was formed for any one or more of the prohibited purposes; (p. 95)

(12) The mere possession of power by a combination of corporations or associations, or persons, to injuriously repress competition, regulate production, and fix prices, is not sufficient to authorize a court to declare unlawful such combination as against public policy, in the absence of proof, or admission, that the parties are actually pursuing such unlawful purpose; (p. 96½)

(13) An injunctional *order* entered in a judge's minutes is appealable;

(14) Injunctional process, or an order having that effect, is not appealable; (p. 92) and

(15) The right to prosecute an appeal from an appealable order is unaffected by one paper including two separate notices referring to two orders, one of which is appealable and the other not. (p. 92)

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## MALLORY v. HANANER OIL WORKS.

(86 Tenn. 598, 8 S. W. 396, 1888.)

**Ultra Vires; Corporate Partnership; Illegal Contract; Rescission; Possession; Forcible Detainer.**

In 1884 four industrial corporations agreed to select a committee composed of one member from each of the corporations and to turn over to it each corporation's properties and machinery, to be managed and operated by and through officers, agents and employees of its own selection for the common benefit, the profit and loss to be shared in certain proportions. It was also stipulated that other like corporations should be admitted into this combination on similar terms. The arrangement was to continue for three years. The Hananer Oil Works was created under the general corporation act of 1875, and was one of the parties to the foregoing contract, the entering into of which was authorized by its directors and shareholders. After all of the properties were thus consolidated and operated for two years under the name of the "Independent Cotton-Seed Association," the Board of Directors of the Hananer Oil Works by resolution declared said contract void, and demanded a surrender of its property. Upon a refusal to comply with this demand an action was brought for unlawful detainer against said association, which resulted in a judgment for the plaintiff. In affirming this judgment it was held that:

(1) A corporation has not the power to enter into a partnership, either with other corporations or with individuals;

(2) A partnership is "a voluntary contract between two or more competent persons to place their money, effects,

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labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them;"

(3) A partnership may be formed, although the beneficial use of the property alone is surrendered to the copartnership for the common purpose;

(4) When an illegal contract entered into by a corporation is only partially performed, it is the duty of such corporation to rescind or abandon the contract at the earliest moment;

(5) The relation of landlord and tenant cannot spring from an illegal contract; and

(6) Where possession of property is obtained under an illegal contract, upon its rescission or abandonment while the contract remains wholly or partially unexecuted, it is the duty of the person in possession to at once surrender the same.

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## MARTELL v. WHITE.

(185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 1904.)

**Conspiracy; Competition; Coercion; Conflicting Principles.**

Manufacturers, quarriers, and polishers of granite formed a voluntary association known as the Granite Manufacturers' Association of Quincy, Mass. One of its by-laws provided that for the purpose of defraying in part the expenses of the maintenance of this organization, any member thereof having business transactions with any party or concern in Quincy or its vicinity, not members thereof, and in any way relating to the cutting, quarrying, polishing, buying or selling of granite (hand polishers excepted), shall, for each of said transactions, contribute at least $1 and not more than $500; the amount to be fixed by the association upon its determining the amount and nature of said transaction. Martell was engaged in a profitable business in quarrying granite and selling the same to granite manufacturers at Quincy and vicinity. In 1899, through the action of the members of said association, all of Martell's customers left him, and his business was ruined. He thereupon brought an action against the members of said association for damages. A verdict having been rendered for the defendants, the plaintiff excepted to the same. In sustaining these exceptions, the supreme court held that:

(1) An unlawful conspiracy to destroy competition exists where an association of persons or corporations pursue an arbitrary and artificial course toward a non-member which has the effect of ruining his business;

(2) Any method used for stifling competition is unlawful when artificial and arbitrary;

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(3) "The weapons used by the trader . . . must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation;"

(4) The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and this end is best attained when the trader is allowed, in his business, to make free use of these laws—he may praise his wares, may offer more advantageous terms than his rival, and may sell at less than cost;

(5) "The right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests. No one can justify an interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction or molestation;"

(6) The imposition of a fine constitutes unlawful coercion when it is imposed by an association of persons and is so large as to amount to moral intimidation, and is used as a means to enforce a right not absolute in its nature but conditional and inconsistent with the conditions upon which it rests; and

(7) "Where there is a conflict between two important principles, either of which is sound, and to be sustained within proper bounds, but each of which must finally yield, to some extent, to the other, . . . the best and only practicable course is to consider the cases as they arise, and, bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through which, at least, the line must run, and beyond which the party charged with trespass shall not be allowed to go."



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## MASON v. ADOUE.

(70 S. W. 347, Tex. Civ. App. 1902.)

**Corporations; Forfeiture of Franchise; Penalty; Abatement.**

At the suit of the state the Galveston Brewing Company, a Texas corporation, was declared to be an unlawful combination in restraint of trade, and its charter was revoked. Section 12, anti-trust law of 1899, authorizes recovery of money paid to companies or corporations unlawfully transacting business in violation of said Act. Frank Mason, claiming to have paid said Brewing Company a large amount of money while it was unlawfully transacting business in Texas, brought suit under said section to recover back such amount. Upon special exceptions the petition was dismissed as insufficient. In affirming the lower court it was held that:

(1) The action authorized by section 12 of anti-trust law of 1899 is penal and not remedial in its nature; and

(2) The right to recover a penalty from a corporation does not survive its demise.

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## McALISTER v. HENKEL.

(26 Sup. Ct. Rep. 385, 201 U. S. 90, 50 L. ed. 671, N. Y. 1906.)

### Witnesses; Immunity.

This case is based upon the same state of facts as the Hale Case with the only exceptions that an actual complaint or charge was made and that the subpoena *duces tecum* was accurately drawn.

It is here specifically held that a person called upon to testify in an action or proceeding brought under the Sherman Act cannot excuse himself from testifying simply because his testimony might incriminate another.

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## McCONNELL v. CAMORS-McCONNELL CO.

(152 Fed. 321, U. S. C. C. A., Ala. 1907.)

**Construction; Equity; Illegal Contracts, Uninforcibility; Procedure.**

About 15 individuals, firms and corporations were, prior to 1899, engaged in the United States in the importation and sale of tropical fruit. This fruit was obtained from the West Indies and Central and South America. Most of the fruit from the West Indies was sold in the Eastern states of the United States. The fruit from Central and South America was principally sold in the Southern, Western and Middle States. In 1899 the United Fruit Company was organized under the laws of New Jersey with a capital of $20,000,000, $15,784,000 having been actually subscribed. Through the issue of mortgage bonds the means of this company were increased to $40,500,000. The purpose for which this company was organized was to purchase the properties and business of the other fruit importing companies, individuals, and corporations, or to make such arrangement with them as would enable it to monopolize the business of importing fruit into the United States and control its sale. For the purpose of regulating the sale of fruit so as to prevent competition this company caused the organization of another corporation with a nominal capital stock of $10,000, known as the Fruit Despatch Company, substantially all the stock of which was owned by the United Fruit Company. Among the competitors of the United Fruit Company in its business at this time were Camors, McConnell & Co., a copartnership. In order to remove them as such competitors negotiations were entered into with the copartners of said copartnership, resulting in an agreement that a corporation should be

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formed with a capital stock of $60,125, divided into 481 shares of the par value of $125 each to take over the business and property of said copartnership; that the business and property of said copartnership was to be paid for with 321 shares of the new corporation; that 161 of these shares were to be purchased by the United Fruit Company for $30,000; that the United Fruit Company was then to subscribe to 80 shares of the unissued capital stock of the new corporation, and the copartnership was to subscribe for 80 additional shares of said stock, the United Fruit Company and the copartnership each paying $10,000 therefor; that the new corporation was to import certain tropical fruit from a certain locality only; that the quantity of the fruit was to be restricted; that the United Fruit Company was not to invade the market to be covered by the new company; that the rules of classification and prices of fruits at ports of shipment were to be mutually agreed upon; that there should be uniform rates of freight between certain steamers; that the Fruit Despatch Company should be the sole and exclusive agent for the new corporation to sell all its imported fruit; that prices were to be fixed weekly by four selected persons, one of them representing the United Fruit Company and one of them representing Camors-McConnell Company, the new corporation; that none of the members of said copartnership were to enter again into business in competition with the United Fruit Company for a certain period; and that the agreement was to be in force for ten years. Separate contracts were then drawn and executed to carry out the object of said agreement. Part of the foregoing agreement was embodied in a contract dated December 8, 1899, entered into between the copartners of Camors, McConnell & Co. and Andrew W. Preston, the latter, although assuming to act independently, was in fact contracting for the United Fruit Company. In this contract there was a stipulation on behalf of those interested in the copartnership of Camors, McConnell & Co. that they would not either in-

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dividually or by or through corporation jointly or severally, directly or indirectly, engage in the growing, importing, or selling of tropical friuts, or in any other business directly or indirectly in competition with the new corporation or with the United Fruit Company, except through the new corporation, until after the said Camors-McConnell Company, the new corporation, should have ceased the active continuance and prosecution of the importing and selling such fruit, or should have failed to have shown a profit for any calendar year after 1899. In a bill filed November 30, 1904, by Andrew W. Preston and Camors-McConnell Company against Herbert L. McConnell, one of the copartners of Camors, McConnell & Co., to enjoin him from violating his said covenant, it was in part alleged, that the Camors-McConnell Company was organized in order to permit Preston to obtain an interest in the business conducted by said copartnership; that the tangible assets of Camors, McConnell & Co. did not exceed $30,000, but that their assets and good will were fully worth $50,000; that the written contract of December 8, 1899, was therefore entered into; that Camors-McConnell Company was subsequently organized; that said agreement was carried out by complainant in all particulars; that as president, general manager and director of Camors-McConnell Company, the defendant became intimately acquainted with the business and affairs of the new corporation, the methods and secrets of its business, the source of its profits, the names of its customers, and the nature, scope and duration of all its contracts; and that although the company had earned a profit every year since its organization, the defendant, in violation of his contract, began some time in 1902 secretly to prepare and engage in business on his own account, or through a corporation to be controlled by him, in direct competition with the business of Camors-McConnell Company. Various means were then shown to have been pursued by the defendant in carrying out his purpose. On March 27, 1905, Andrew W. Preston dismissed the

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bill, as far as it concerned himself, without prejudice. The defendant answered in detail showing the real agreement to have been as above set out, and that only a portion of such agreement was reduced to writing and described in the bill, and charged that the contract sued upon was to aid the United Fruit Company and other companies in combination with them in conducting their business in violation of the laws of the United States and to facilitate such violation; that said contract was made in restraint of trade and commerce among the several states and with foreign nations, for the purpose of forming and maintaining a combination in the form of a trust; that the several agreements were made and entered into after the United Fruit Company had bought out the property and business of a large number of competitors in the importation and sale of tropical fruits in the Central, Southern and Western States, and bound most of the parties making such sales not to compete with them in the business; that the United Fruit Company and said corporations and parties with whom it had such agreements fixed and regulated under such agreements the price at which tropical fruits were purchased at the point of shipment, and sold and disposed of all of the fruit so imported by it through the Fruit Despatch Company in such manner as to fix and control the price at which tropical fruit was sold throughout the United States; that out of the commissions paid to the Fruit Despatch Company the expenses of that company were paid, and the balance of its earnings were distributed *pro rata* among the several companies whose fruit it handled; that by virtue of said several agreements and combinations, the United Fruit Company and its associates not only fixed and regulated the prices at which tropical fruits were purchased and sold, but monopolized almost the entire business in the Southern, Central and Western States of the United States, and regulated the prices of tropical fruits therein, and when necessary to do so in order to control and fix such prices the said Fruit Des-

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patch Company, under the control and direction of said United Fruit Company, caused a great deal of fruit to be destroyed; and that the contract sued upon was against public policy and null and void. The complainant excepted to several portions of the answer showing the full transaction between the parties. These exceptions were referred to a master who sustained them. Exceptions to the master's report, having been overruled, the case was heard upon its merits, the hearing resulting in a decree perpetually enjoining the defendant from engaging in business in competition with the business of complainant for and until it has failed to show a profit for any calendar year after 1899. In reversing the lower court with direction to overrule the exceptions to said answer, it was held that:

(1) Where a written instrument is only a portion of a contract, the whole contract is none the less one and indivisible, although the entire agreement, in the first instance, was in parol; (p. 330)

(2) The unity of a contract is not severed, or its meaning and effect in any degree altered by putting part of it in writing and leaving the rest in parol; (p. 331)

(3) "It is the function of the chancellor to look through the form to the substance of the matter in which he is asked to act;" (p. 332)

(4) A court of equity will refuse relief where its granting would be in substance to enforce a contract illegal as against public policy, although one of the parties interested in such contract is not an actual party to the proceedings; (pp. 331, 332) and

(5) The principles of pleading, practice, and procedure grow with the advance of civilization and commerce. (p. 332)

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## McCUTCHEON v. MERZ CAPSULE COMPANY.

(19 C. C. A. 108, 71 Fed. 787, 31 L. R. A. 415, U. S., Mich. 1896.)

**Corporate Stock Ownership; Ultra Vires; Pari Delicto; Injunction.**

In November, 1893, the National Capsule Company, a New Jersey corporation, Merz Capsule Company, a corporation of Michigan, the Warren Capsule Company and the Michigan Capsule Company, two copartnerships doing business at Detroit, Michigan, agreed: (a) to organize a corporation with a capitalization of $70,000 to be allotted to each party to the agreement in certain proportions and under certain conditions; (b) to sell to such organized company their respective plants, machinery, stock, good will, patents, etc., and receive in payment the new corporation's bonds secured by mortgage on all of its property so acquired; (c) to receive notes in payment for the manufactured stock, etc., to be conveyed to the new company; (d) not to make future contracts for the sale or delivery of the commodity theretofore manufactured by the respective parties; (e) not to engage in their respective businesses in any manner whatsover; and (f) that the new company should bear the expense of organization and appraisement. Pursuant to this agreement a new company—United States Capsule Company—was organized under the laws of New Jersey, appraisals of the several properties were made, and stock was allotted to each of the parties according to said agreement. Although the Merz Capsule Company executed an instrument of sale to the United States Capsule Company, and that company gave back a lease in consideration of a nominal rent for the purpose of working out unfinished contracts, these transactions were not com-

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pleted; nor did the United States Capsule Company execute and issue mortgage bonds and distribute them among said parties. While this transaction remained in this state, the Merz Capsule Company withdrew from it, claiming its illegality. Special and public notice of invalidity of the transaction was given by the Merz Capsule Company to the officers of the United States Capsule Company. Nevertheless, that company, in 1894, attempted to take forcible possession of the Merz Capsule Company plant and machinery and to demolish the same, but was prevented by the Merz Capsule Company. The Merz Capsule Company thereupon filed its bill against the United States Capsule Company, Robert H. McCutcheon, its president, the National Capsule Company, and the copartners doing business as Warren Capsule Company and the Michigan Capsule Company. The bill set out the several contracts and conveyances and charged that the object and purpose of said combination was to suppress competition and create a monopoly. The bill further alleged the foregoing trespass, threats to repeat like trespasses and interference with complainant's business; and that complainant's business was of such a nature that if it were permitted to be destroyed irreparable injury would result. The prayer was for cancellation of the several agreements and conveyances and for an injunction. After a temporary injunction was granted, as prayed, the suit was removed to a United States circuit court upon defendants' petition. The United States Capsule Company thereupon answered and filed a cross-bill setting up the said several agreements, contracts, and conveyances as valid and legal instruments, and praying that they might be so decreed, and that it be placed in full and peaceable occupation of all the property, premises, plant, and machinery thereby transferred to it, and that the same, in all regards, be specifically enforced and performed. Upon full proof, and by final decree, the circuit court perpetually restrained the United States Capsule Company from the commission of further

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trespass as prayed, and declared the several agreements *ultra vires* and illegal under the law of Michigan. The further decree of the court was "that neither the defendant, the United States Capsule Company, nor any other of the defendants in the original bill of complaint in this cause, has any title, right, claim, or demand whatsoever in, to, or upon the property of the complainant, the Merz Capsule Company, described in the bill of complaint, and the title thereto is quieted in the said Merz Capsule Company, free from any claims of the defendants in said original bill, or of any of them." The court declined to order an account of damages sustained by complainant, and for this purpose remitted it to a court of law. The cross-bill of the United States Capsule Company was also dismissed, as stating no case entitling it to specific performance. In affirming the lower court, it was held that:

(1) A sale by an industrial corporation of its entire property and good will, with an agreement never again to engage in the same business, made in consideration of the owning and holding of stock in a new corporation, through which the corporate existence and affairs of the seller are to be continued and exercised, is *ultra vires,* and void;

(2) Under the laws of Michigan an industrial corporation cannot invest its funds in the stock of another corporation;

(3) When an act of a corporation is *ultra vires* in the sense that the act is absolutely null and void, stockholders of the corporation cannot legalize or vitalize the transaction by their consent;

(4) A court of equity will grant affirmative relief to one of the parties *in pari delicto* where the contract is unexecuted and has been repudiated by him, and when a refusal of such relief would effectuate an unlawful object, defeat a legal prohibition, or protect a fraud; and

(5) Where a party to an illegal contract has repudiated it and the other party insists upon his so-called rights under the same, threatening to commit injury and irreparable loss, a

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court of equity, at the instance of the first party, will restrain the other, "provided relief is sought without delay, and before the contract is executed, or other persons have irrevocably acted in reliance upon its supposed legality."

NOTE.

In the case of Davis v. A. Booth & Co. (131 Fed. 31, 37, 1904), Severens, J., said:

"There is a clear distinction * * * between the aggregation of properties by purchase when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination. To this latter class belongs the case of Merz Capsule Co. v. United States Capsule Co. (C. C.) 67 Fed. 414, affirmed in 71 Fed. 787. It may be that the practice of acquiring by a single corporation, through purchase of a great number of single plants in several states, of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but, if so, it would seem that the limitations and the means for the restriction and correction required must be supplied by the lawmaking power, since the old law against forestalling the market has become obsolete."

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## MENNE FACTORY v. HARBACK BROS.

### Pleading.

(— Ark. —, 107 S. W. 991, 1908.)

In an action brought in Arkansas, the plaintiff, a corporation, alleged that it was doing business in Kentucky and that the defendants were indebted to it in a certain amount on account of goods and merchandise sold to them. The defendants answered admitting the purchases but claimed that the plaintiff, at the time the goods were sold, was a member of or a party to a trust, agreement, or confederation, under the name of National Candy Company, such as is prohibited by Arkansas Act of 1905 against monopolies. The answer failed to allege that the plaintiff was transacting an *intrastate* business in Arkansas when the sales to the defendants were made. To this answer there was a demurrer, which demurrer was overruled. In reversing said judgment it was held that:

(1) An answer or plea to an action under section 4 of Arkansas anti-trust law of 1905, relieving purchasers from liability for goods purchased by them of an illegal trust or combination, must state that the plaintiff was transacting or doing business in the state when the sale was made;

(2) The validity of a contract is governed by the laws of the state where it is made; and

(3) States have no power to control interstate sales.

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## MEREDITH v. NEW JERSEY ZINC & IRON CO.

(37 Atl. 539; aff'd—no opinion—41 Atl. 1116, N. J. 1897.)

**Corporations; Increased Capital Stock; Consolidation; Monopolies.**

A series of disputes resulted from the fact that the titles to two separate mineral substances found in the same lodes or veins at a certain place were in different owners. To settle in a most practical manner legal complications that arose out of these conflicting claims the New Jersey Zinc & Iron Company was organized. Both titles were conveyed to this company, which also acquired, at the same time, certain other mines located in other states and owned by other corporations. The consolidation or merger of the different properties was carried out under a contract entered into by the several parties pursuant to a stockholders' meeting of the New Jersey Zinc & Iron Company, at which its powers were enlarged, its capital stock increased, and the contract was approved by about eight-tenths of the stockholders. To enjoin the performance of this contract, minority stockholders of said company instituted proceedings, claiming: (a) that the transaction was *ultra vires* the company in that a greater sum was contracted to be paid than the whole capital stock of the company; (b) that the proposed consolidation would result in the creation of a monopoly and thereby render the complainants' stock and rights liable to forfeiture at the suit of the state, and (c) that the manner of increasing and distributing the increased capital stock could be accomplished only by dividing, among the present stockholders, stock in proportion to their holdings. In denying a motion for a temporary injunction it was held that:

(1) Where the particular circumstances under which a contract is entered into by a corporation do not show that

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the contract is the result of improvidence, and it appears that such contract has been approved by a large majority of the stockholders, the performance of it will not be interfered with by the courts;

(2) Where the capital stock of a corporation is increased, each stockholder is not entitled to a proportionate share of the new stock when the additional capital stock is issued for property purchased by the corporation;

(3) The mere purchase by a corporation of all the property of another, in order to consolidate the whole into one business, does not of itself establish a monopoly in that business, and is not against public policy; and

(4) Where an otherwise valid contract is entered into under circumstances which do not show that its object was to create a monopoly, such unlawful purpose will not be presumed.

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## METCALF v. AMERICAN SCHOOL-FURNITURE CO.

(122 Fed. 115, U. S. C. C., N. Y. 1903.)

**Corporations; Voluntary Dissolution; Statutes; Corporate Stock Ownership; Stockholder's Rights; Parties; Pleadings; Presumption.**

The Buffalo School-Furniture Company, a West Virginia corporation, transacted business and had its property in the state of New York. In 1900 it sold and conveyed all of its property and assets to the American School-Furniture Company, a New Jersey corporation, pursuant to resolution adopted and ratified by about two-thirds of its stockholders. In 1901 Caroline Metcalf brought a bill in equity in behalf of herself and all other stockholders having like interests with her, against the Buffalo School-Furniture Company, a number of its directors, and the American School-Furniture Company, alleging, in substance: that the American Company and the directors of the Buffalo Company had conspired to injure the complainant and her associates; that said Buffalo Company had sustained irreparable injury and loss because of such conspiracy; that said conspiracy was conceived with the intent to absorb the property of the Buffalo Company, and to pay therefor a sum grossly less than the actual value; that the object of said conspiracy was to promote an illegal confederacy to restrain trade and commerce, and to create a monopoly; that the intent and purpose of said conspiracy was to increase and control the price of school furniture in the several states and territories; that the consideration for the transfer was secret, a portion having been retained by the directors as a secret profit, and that a price far less than the actual value of the assets of the Buffalo Company was accepted; and that a portion only of the con-

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sideration was paid in cash, the balance having been paid with valueless stock of the American Company. The defendants demurred to part, and answered to part, of this bill. On a hearing upon these demurrers the bill was dismissed for want of equity, the court holding that:

(1) Where a statute, charter, and by-laws of a corporation vest in its stockholders a right of sale of the corporate properties and discontinuance of corporate existence, a majority of the stockholders of such corporation may, if done in good faith, exercise such power; (p. 119)

(2) Generally (at common law) a prosperous corporation cannot be dissolved unless all of its stockholders assent; (p. 119)

(3) "A corporation organized under the laws of West Virginia has power, under Code W. Va. 1899, chapter 53, section 56, to sell and transfer all of its property and discontinue its business by the action of the holders of a majority of the stock, taken at a general stockholders' meeting;" (syl, 3)

(4) Where a corporation has the right, under its charter, to dispose of its property and to dissolve its corporate existence, it has also the power to accept stock in another corporation in payment of the purchase price, provided the transaction is *bona fide;* (p. 126)

(5) "The provisions of Code W. Va. 1899, chapter 52, sections 3, 4, which prohibit the purchase of stocks, bonds, or securities, by a corporation, except when taken in payment of a debt, or as security therefor, apply only while the corporation is a going concern, engaged in carrying on the business for which it was created;" (syl. 10)

(6) An *ultra vires* executed contract cannot be rescinded; (pp. 123, 124)

(7) The mere fact that one of the parties to a contract founded on a valid consideration constitutes an unlawful combination in restraint of trade does not invalidate such contract; (p. 120, *et seq.*)

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(8) Whenever a corporation wrongfully refuses to enforce its rights, a stockholder in behalf of such corporation may invoke the proper redress; (p. 119)

(9) A stockholder cannot prevent or control the lawful management of the affairs of the corporation, nor the discretion exercised in the sale of its property, unless such acts are *ultra vires* or in fraud of the stockholder's rights; (p. 123)

(10) The only party entitled to prevent a violation of the provisions of the Federal anti-trust acts is a United States attorney, at the instance of the attorney-general;

(11) When a bill is not framed on the theory of an accounting, a mere averment charging the receipt of secret profits as an act in furtherance of an unlawful conspiracy is insufficient to sustain such a bill on that ground; (p. 123) and

(12) When a plea is brought on for argument by complainant, the facts therein alleged will be regarded as true. (p. 117)

NOTE.

This case was first before the court (108 Fed. 909) on demurrers to the bill, which were sustained on the ground of multifariousness. On appeal to the circuit court of appeals, this judgment was affirmed (113 Fed. 1020) on the opinion below.

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## MILWAUKEE MASONS' & BUILDERS' ASSOCIATION v. NIEZEROWSKI.

(95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St. Rep. 97, Wis. 1897.)

**Trade Restraint, Test; Parties; Actions; Maxims; Practice.**

The Masons' & Builders' Association, a corporation, had a membership in Milwaukee of about sixty out of seventy or seventy-five mason contractors. By private by-laws of this association its members were required to bid for contract work and additions or changes thereto, in a certain manner, and under the control of a committee. This committee was authorized to and did add six per cent to the lowest bid before it was submitted to the owner or person for whom the bidding was done. Upon the award of the contract pursuant to the bid, and before its complete performance, the successful bidder and contractor was required to pay to the association the six per cent added to his bid. The association had contract arrangements with material men in the city whereby its members obtained thirty-three and one-third per cent rebate upon all material used by them. Members were subject to fines for noncompliance with by-laws. While a member of this association, in 1892, N obtained a large contract through independent bidding. The association thereupon claimed its usual six per cent on amount of bid. In order to avoid being boycotted by members of the association N gave his note to said association for amount of said claim. Having failed to pay it when due, an action was brought by the association against N. He pleaded want of consideration in that the note was given by and secured from him when a member of said association pursuant to a secret com-

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bination and confederation of the association and its members to exact of and from citizens of Milwaukee, Wisconsin, desiring to erect and construct buildings, a sum equal to six per cent in excess of the actual cost and value of the work to be done, and by secret means to prevent and suppress competition in bidding for such work; and that the note in question was given and received for the purpose and as a means of carrying into effect such alleged unlawful combination. The defendant had judgment. In affirming said judgment it was held that:

(1) Agreements which, in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and unreasonably result in the disadvantage of the public, or of third parties, are against the principles of sound public policy, and void;

(2) The true test of the illegality of a combination to restrain business or trade is its effect upon public interests;

(3) An agreement in restraint of trade may exist between a corporation and its members;

(4) No cause of action arises out of an immoral consideration; and

(5) By failing to perfect judgment within sixty days after entry of the verdict, the right to recover costs, under section 2894*a*, Sanb. & B. Ann. St., is lost.

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## MINNESOTA v. NORTHERN SECURITIES CO. et al.

(194 U. S. 48, 48 L. ed. 870, Minn. 1904.)

**Actions, Parties; Jurisdiction, Federal; Removal of Causes; Construction; Federal Practice.**

Pursuant to an agreement between certain stockholders of the Great Northern Railway Company and the Northern Pacific Railway Company, respectively, representing a controlling interest in the stock of each company, these two railroad companies, each of which owned or controlled and maintained a system of railways connecting the Great Lakes and the Pacific Ocean, their main lines being substantially parallel and competing, caused the incorporation, under the laws of New Jersey, of the Northern Securities Company solely as an instrumentality through which the stock, property and franchises of both of said railroad companies were to be consolidated, the management and control of their business affairs, including the fixing of rates and charges for the transportation of passengers and freight, to be delegated to said new company, and said new company in other respects to conduct and operate said old companies as one system of railway or enterprise. Long prior to the organization of the Securities Company, there existed in Minnesota special statutes prohibiting the consolidation of stock, property or franchises by competing or parallel railroads. There also existed at that time a general statute against monopolies of every kind. To prevent the Securities Company from operating the Great Northern Railway Company, which was a Minnesota corporation, the state of Minnesota brought a suit in one of its courts against said railway company, the Northern Pacific Railway Company, a Wisconsin corporation, and the Northern Securities Company. In this proceeding the State

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charged that by means of said arrangement between the stockholders it was sought to evade and violate the laws of the state prohibiting the consolidation, etc., of parallel and competing railroads, as well as the laws against combinations in restraint of trade or commerce within the state and between the people of Minnesota and the people of other states and countries; and that if the Securities Company were permitted to hold and control the stock of the constituent railway companies and carry out the purpose and object of its incorporators, as well as its own, full faith and credit would not be given to the public acts of the state of Minnesota, and that state would be deprived of a further right guaranteed to it by the constitution of the United States. On the petition of the Securities Company, this proceeding was removed to a Federal court, which court dismissed the complaint upon its merits. In reversing this judgment and directing the lower court to remand the case to the state court, it was held that:

(1) Actions to enforce the provisions of the Sherman Act must be brought by the district attorneys of the United States, acting under the direction of the attorney-general, and are limited to direct proceedings in equity to prevent and restrain such violations of the act as cause injury to the general public from suppression of competition in trade and commerce among the several states and with foreign nations, thus securing to said act its enforcement, so far as direct proceedings in equity are concerned, according to a uniform plan, operative throughout the entire country;

(2) A criminal prosecution, under the Sherman Act, must be in the name of the United States and in a court of the United States, the district attorney conducting the prosecution being subject, as to the manner in which his duties shall be discharged, to the attorney-general's direction;

(3) State anti-trust laws are unenforcible in Federal courts;

(4) A state is not a citizen for the purpose of Federal jurisdiction on the ground of diversity of citizenship;

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(5) A Federal court cannot acquire jurisdiction by consent of parties;

(6) A case can be removed from a state court as one arising under the constitution or laws of the United States only when the bill, complaint or declaration shows the case to be of that character, a defendant's right of removal, under sec. 2 of the Act of March 3, 1875, being governed by the plaintiff's, complainant's or petitioner's right to institute suit under sec. 1 of said Act;

(7) Notwithstanding an allegation in a complaint, etc., conferring jurisdiction upon a Federal court in a removed case, if the court finds at any time that the case does not really and substantially involve a dispute or controversy within its jurisdiction, then, by the express command of the Act of 1875, its duty is to proceed no further, except to remand the case;

(8) Article 4, Federal constitution, providing that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records and judicial proceedings of a state other than that in which the court is sitting, and does not apply to the conduct of individuals or corporations; and

(9) Where the record of a case does not affirmatively show jurisdiction in the lower court, the supreme court must, upon its own motion, so declare, and enter such order as will prevent the lower court from exercising any authority not conferred upon it by statute.

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## MITCHELL v. REYNOLDS.

(1 P. Wms. 181, 1 Smith Lead Cas., 7th Eng. ed. 407, 8 Am. ed. 756, Eng. 1711.)

**Restraint of Trade, General and Partial, Validity, Presumption; Practice; Evidence.**

The plaintiff leased from the defendant his premises and bakery for five years, taking a bond that he should not, during the term of the lease, exercise his trade as a baker within the parish where the bakery was situatd, or that he should pay a stipulated sum. To an action of debt on this lease, or bond, the defendant interposed a demurrer. In giving judgment for the plaintiff it was held that:

(1) All general restraints of trade are against public policy and void; (1 P. Wms., 185, 187)

(2) Contracts in particular restraint of trade, when based upon sufficient consideration and reasonable, are valid; (pp. 185, 187)

(3) A contract in restraint of trade is *prima facie* void, unless a sufficient consideration, and its reasonableness, appear from its express terms; (p. 191)

(4) A restrictive covenant or contract in restraint of trade, if otherwise lawful, may be expressed in the form of a bond, providing for stipulated damages in case of breach; (p. 193)

(5) Whether a contract in restraint of trade is valid under the particular circumstances is a matter of law for the court to determine; (p. 195) and

(6) Where there is a lack of sufficient consideration for entering into a written contract in restraint of trade, evidence is admissible to show the real consideration or want of consideration, because the instrument would be void on ac-

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count of want of consideration, and the principle that one is estopped from contradicting a written instrument is inapplicable. (p. 196)

NOTE.

Since the case of Nordenfelt v. Maxim-Nordenfelt Company, the distinction between general and particular restraint of trade is no longer recognized in England.

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## MOGUL STEAMSHIP CO. v. McGREGOR et al.

(23 Q. B. Div. 598, Eng. 1889.)

**Competition; Exclusive Contracts; Rebates; Conspiracy.**

A number of shipowners in 1884 and 1885, formed themselves into a "Conference" or association for the purpose of maintaining freight rates in the transportation of tea between certain European ports, and securing to themselves a monopoly of this trade. In carrying out said purpose it became necessary for them to reduce freight rates for the sole purpose of driving out competition, and offer rebates as an inducement to exclusive dealing with their agents and customers. The plaintiffs, having attempted to do a carrying trade between some of the ports controlled by the "Conference," were prevented from securing such trade on a profitable basis by the defendants' issuing certain notices to their customers or agents, putting into effect an unprofitable schedule of rates, and sending special boats to compete with the plaintiffs. Thereupon the plaintiffs brought an action of civil conspiracy against defendants, claiming damages and an injunction against the continuance of the alleged wrongful acts. This action was tried without a jury by Lord Coleridge, C. J., who rendered judgment in the defendants' favor. On appeal this judgment was affirmed by Bowen and Fry, L. JJ., Lord Esher, M. R., dissenting. In affirming said judgment it was held that:

(1) Damage resulting to a tradesman from the mere exercise of his trade, when not accompanied by dishonesty, intimidation, molestation or violence, is not actionable at common law;

(2) Every tradesman, as between himself and other traders, has a right to absolute freedom in trading, without re-

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gard to the fairness or reasonableness of his business conduct, except that no one, whether trader or not, has the right to injure another in his commercial business by fraud or misrepresentation, intimidation, obstruction, molestation, or the intentional procurement of violation of individual rights, contractual or otherwise;

(3) The act of an individual harming another is not illegal when, in the race of competition, there is no intention to do any other or greater harm to him than is necessarily involved in the desire to advance one's own trade, or to protect it;

(4) An illegal combination or conspiracy is an agreement by two or more to do an unlawful act, or to do a lawful act by unlawful means;

(5) Where the conspiracy consists of doing an unlawful act, the act must have been such as was intended to result in another's injury without cause or excuse;

(6) It is not unlawful under English law for capitalists to combine, for the *mere* purposes of trade and competition, where capital may, apart from combination, be legitimately used in trade;

(7) Competition exists when two or more persons seek to possess or to enjoy the same trade; and

(8) Under the common law, contracts in restraint of trade are not "illegal," but merely unenforcible.

NOTE.

With one exception the foregoing is taken from Lord Bowen's judgment. Lord Fry, in his opinion or judgment, arrives at the same conclusions as does Lord Bowen, by a different course of reasoning. Both judgments show a fine sense of discrimination and are adopted in various forms by the House of Lords in seven separate opinions. [1892] A. C. 25.

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## MOLLYNEAUX v. WITTENBERG et al.

(39 Neb. 547, 58 N. W. 205, 1894.)

**Trade Restraint; Vendor's Covenant; Pleading; Damages.**

Plaintiff sued defendants for breach of a stipulation in a deed binding the grantee not to use the conveyed property for hotel purposes during two years from a given date. The action was defended, principally on the ground that such stipulation was in restraint of trade; and further that the stipulation was within the 1889 anti-trust law. On defendants' motion embodying said objections, among others, the petition was dismissed. This judgment was reversed, the reviewing court holding that:

(1) A stipulation in a deed, founded on a good consideration, not to use the conveyed premises for a specified business during a limited time is not in restraint of trade; (N. W. 208)

(2) A covenant in a deed not to use conveyed premises for hotel purposes during a limited period is not within the anti-trust law of 1889; (p. 208½)

(3) The petition involved in the case stated a good cause of action; (p. 209)

(4) New matter in a pleading may be answered by any matter constituting a defense to such allegations and not inconsistent with the former pleading of the party answering or replying; (p. 209) and

(5) A breach of a contract by one of the parties to it entitles the other party to at least nominal damages. (p. 209½)

NOTE.

This case was again before the supreme court on appeal of Wittenberg, 83 N. W. 842.

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